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CIVIL CODE OF PRACTICE

OF THE

STATE OF KANSAS.

By IRWIN TAYLOR,

AUTHOR OF TAX LAWS OF KANSAS, BRIEF-DIGEST OF KANSAS REPORTS, ETC.

TOPEKA, KANSAS:

GEO. W. CRANE & CO., LAW BOOK PUBLISHERS.
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PREFACE.

THE Code of Practice is a necessary part and parcel of every Kansas lawyer's library—a book more used than any other—being the only practical guide through the labyrinths of a law suit from its inception to its close. Although contained in the Statutes, it is there in very cumbersome form, and is mixed in with matter that is used by attorneys but seldom, whilst the code is in constant use in the office and court room.

The leading States have the Code in a separate, handy form, and as such the publication has always been approved of by the bar. The Kansas Code, here presented, contains the Code of Civil Procedure, and also the Civil Code for Justices, with full notes of decisions of the Supreme Court of Kansas bearing on these sections.

It is believed that much labor will be saved the profession—and surely, faithful attorney needs all the help, light and assistance of every legal convenience that will save time and trouble, and enable him in this fast age to read as he runs. Trusting that this will be realized in a measure by the "Annotated Code," and that the labors spent in its preparation will be appreciated by the bar, the author, with much solicitude, consigns it to their hands.

TOPEKA, November, 1886.

IRWIN TAYLOR.

CIVIL CODE.

CHAPTER 80, COMPILED LAWS OF 1885.

AN ACT to establish a Code of Civil Procedure.

[Took effect October 31, 1888.]

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Be it enacted by the Legislature of the State of Kansas:

(8794) §1. **Code.** This act shall be known as the code of civil procedure of the state of Kansas.

In this state all distinctions between law and equity are abolished. *Deering v. Boyle*, 8-527.

The action of interpleader cannot be maintained where another plain and adequate remedy has been given by statute. *Board v. Scoville*, 13-26.

(3795) **§ 2. Construction Liberal.** The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions, and all proceedings under it, shall be liberally construed, with a view to promote its object, and assist the parties in obtaining justice.

The code must be liberally construed. *Munn v. Taulman*, 1-258; *Wooster v. McKinley*, 1-317; *Bliss v. Burnes*, McC.-95; *Scarborough v. Smith*, 18-401.

Plaintiff would have the privilege of suggesting amendments to the evidence to case-made or any part of the case-made, if desired; code should be liberally construed. *Gulf Railroad v. Wilson*, 10-111.

(3796) **§ 3. Division of Remedies.** Remedies in the courts of justice are divided into: *First*, Actions. *Second*, Special proceedings.

(3797) **§ 4. Action Defined.** An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

A petition to vacate an original judgment and for a new trial—such a proceeding partakes to a very great extent of the nature of a suit in equity to vacate or set aside a judgment for fraud or otherwise; and if the proceeding itself does not arise to the grade or dignity of an action, it partakes to a very great extent of the nature of an action. *Fullenwider v. Ewing*, 30-22.

(3798) **§ 5. Special Proceeding.** Every other remedy is a special proceeding.

(3799) **§ 6. Kinds of Action.** Actions are of two kinds: *First*, Civil. *Second*, Criminal.

(3800) **§ 7. Criminal Action.** A criminal action is one prosecuted by the state as a party, against a person charged with a public offense, for the punishment thereof.

Petition in error cannot be taken in a criminal case, and will not lie in a prosecution under a city ordinance. *Neitzel v. Concordia*, 14-449.

Habeas corpus is not a criminal action, within the definition given in § 7. *Gleason v. Commissioners*, 30-54.

(3801) **§ 8. Civil Action.** Every other [action] is a civil action.

(3802) **§ 9. Remedy Civil, Criminal.** Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

ARTICLE 2—FORM OF CIVIL ACTIONS.

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(3803) **§ 10. Form of Action.** The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and in their place there shall be, hereafter, but one form of action, which shall be called a civil action.

In a suit for conversion of personalty, the defendant may show that the title and right of possession is in another than the plaintiff, and that the taking and carrying away was done by the defendant as agent of and in presence of the real owner; and it makes no difference what the action may be called—whether trover and conversion, trespass *de bonis asportatis*, or a “civil action” under the civil code. *Huffman v. Parsons*, 21-473.

Under the code, the old common-law doctrine as to the assignment of choses in action has been materially departed from. *Krapp v. Eldridge*, 33-108.

We now have no action of trespass *quare clausum fregit*, nor of trespass *de bonis asportatis*, nor of trover; but only one form of action, called a civil action. *McGonigle v. Atchison*, 33-736.

Under the code there is but one form of action. *State v. Marston*, 6-532.

Mandamus should be brought in name of party in interest as plaintiff. *State v. Commissioners*, 11-70.

The defendant may set forth in his answer as many grounds of defense, whether they be legal or equitable, as he may have. *Rose v. Williams*, 5-490.

We have no action of trespass *quare clausum*; nor of *case*. We have but one form of action, which is called a civil action, and under this form all civil actions must now be prosecuted. *Fitzpatrick v. Gebhart*, 7-43.

Statutes of limitation apply equally to actions at law and suits in equity. *Chick v. Willetts*, 3-390.

In this state all distinctions between actions at law and suits in equity, and the forms of all such actions and suits, are abolished. *Deering v. Boyle*, 8-527; *Going v. Orns*, 8-89.

(3804) **§ 11. Parties to Action.** In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

The action of mandamus, as well as every other civil action, should, under the statutes of Kansas, where no special provision is otherwise made, be brought and prosecuted in the name of the real party in interest. *State v. Marston*, 6-532; *State v. Commissioners*, 11-70.

(3805) **§ 12. Issues.** There can be no feigned issues; but a question of fact, not put in issue by the pleadings, may be

tried by a jury upon an order for the trial, stating distinctly and plainly the question of fact to be tried; and such order is the only authority necessary for a trial.

The court may, in some cases, direct the jury to find upon particular questions of fact not put in issue by the pleadings. *Akin v. Davis*, 11-591.

ARTICLE 3—TIME OF COMMENCING CIVIL ACTIONS.

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14. Right of action not revived, when.
15. Civil actions to be commenced within what time.
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24. When payment or acknowledgment in writing revives cause of action.
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(3806) **§13. Suits Pending.** This article shall not apply to actions already commenced, but the statutes now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form.

(3807) **§14. Limitation; Revivor.** Any right of action, which shall have been barred by any statute heretofore in force, shall not be deemed to be revived by the provisions of this article.

(3808) **§15. Limitation.** Civil actions can only be commenced within the periods prescribed in this article, after the cause of action shall have accrued; but where, in special cases, a different limitation is prescribed by statute, the action shall be governed by such limitation.

(*Code 1859.*) It is certainly no stretch of construction to say that a limitation of two years with reference to contracts in writing executed out of the state is a "special case" within the meaning of §14, and with reference to §20, and if so not provided for, or intended to be provided for, in the latter section. *Bonifant v. Doniphan*, 3-35.

The allegation of the time within which a cause of action accrued may, in general, be wholly omitted. In those cases only, where the allegation of time in common law pleading was material and traversable, need the time now be stated. *Backus v. Clark*, 1-303.

(3809) **§16. Limitations; Real Property.** Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter:

First, An action for the recovery of real property sold on execution, brought by the execution debtor, his heirs, or any person claiming under him, by title acquired, after the date of the judgment, within five years after the date of the recording of the deed made in pursuance of the sale.

Second, An action for the recovery of real property sold by executors, administrators or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased person, or the ward or his guardian, or any person claiming under any or either of them, by title acquired after the date of the judgment or order, within five years after the date of the recording of the deed made in pursuance of the sale.

Third, An action for the recovery of real property sold for taxes, within two years after the date of the recording of the tax deed.

Fourth, An action for the recovery of real property not hereinbefore provided for, within fifteen years.

Fifth, An action for the forcible entry and detention, or forcible detention only, of real property, within two years.

That statute fits this case exactly. This property was sold on execution. The action is brought by the execution debtor, and a late grantee from her, and not commenced until after five years from the recording of the sheriff's deed. The execution was from a court of competent jurisdiction, and the statute of limitations is a bar to this action. * * * That statute is in aid of defective proceedings, and to support titles based upon judicial action in which the critical and careful lawyer may detect errors. *Cheesebrough v. Parker*, 25-570.

Where a sheriff's deed was executed June 19, 1863, the five years' statute of limitation in the code of 1863 has no application. *Ogden v. Walters*, 12-283.

A mere trespasser without color of right or title, who has been in actual possession of real estate for fifteen years, claiming title thereto, becomes the owner of the property by virtue of the statute of limitations, if the property has been owned during all that time by some individual. *Wood v. M. K. & T. Railway*, 11-348.

This section only applies to actions brought for the recovery of the possession of real property. *Main v. Payne*, 17-609.

(*Subd. 3.*) Action to quiet title by party in possession, against tax-deed

holder, may be barred, and at same time holder of tax deed may be barred of right of action to recover the lands. *Doyle v. Doyle*, 33-725.

(*Subd. 3.*) A tax deed was filed for record Nov. 30, 1876; an action for the recovery of the real property therein embraced was begun April 22, 1879, and in such action the controversy turned upon the validity of the tax deed. *Held*, The plaintiff's right to sue was not barred by the statute of limitations in subd. 3, § 16 of the code, as a different limitation is specially prescribed in § 141, ch. 34, L. 1876. *Long v. Wolf*, 25-525.

(*Subd. 3.*) Tax deed made for levy when the land was not subject to taxation, is absolutely void, and though duly recorded for more than two years, and the land vacant, gives the holder no right to the premises. *Taylor v. Miles*, 5-506.

(*Subd. 3.*) The two-years' statute of limitation mentioned in said subdivision applies to a party out of possession, and seeking to recover upon the strength of a tax title. Such a party must bring his action for the recovery of the real property sold for taxes within two years after the date of the recording of the tax deed. *Thornburgh v. Cole*, 27-498.

(*Subd. 3.*) After a tax deed has been recorded two years, an action for the recovery of the property is barred. *Bowman v. Cockrill*, 6-311.

(*Subd. 3.*) Applied to tax title. *Harris v. Curran*, 32-586.

(*Subd. 3.*) If in conflict with § 141, tax law, the latter must control. *Harris v. Curran*, 32-587.

(*Subd. 3.*) Action to quiet title is not action for the recovery of real property under this section. *Walker v. Boh*, 32-358.

When the plaintiff is the holder of a tax deed, the defendant may prove the plaintiff was absent from the state after the recording of the tax deed, so as to show that the plaintiff cannot invoke the protection of the statute of limitations, under § 21. *Case v. Frazier*, 31-689.

(*Subd. 3.*) Where the land is actually vacant and unoccupied for more than two years after the recording of the tax deed, the holder of such a deed has two years from the time that the original owner, or other person, takes actual possession of the land before being barred of his right of action to recover the possession thereof. *Case v. Frazier*, 30-345.

(*Subd. 3.*) The law, as it stands upon the statute book, is the same as to persons out of possession, and claiming title to property under tax deeds, as to those in possession. The statute of two years, by its terms, applies as much to the one as to the other. Possession is not referred to therein; nor does any claim of title or entry under color of title, in good faith, or otherwise, make a part of the provision of limitation. We have no right to extend its conditions. A tax deed void on its face will not protect a person in possession of the premises for two years under it. *Waterson v. Devoe*, 18-230.

(*Subd. 5.*) Actual possession of real estate under equitable color of title for over four years bars action of forcible detainer. *Alderman v. Boeken*, 25-659.

(3810) **§17. Disability.** Any person entitled to bring an action for the recovery of real property, who may be under any legal disability when the cause of action accrues, may bring his action within two years after the disability is removed.

(3811) §18. **Other Actions.** Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

Contracts. *First*, Within five years: An action upon any agreement, contract or promise in writing.

Contracts; Liability. *Second*, Within three years: An action upon a contract, not in writing, express or implied; an action upon a liability created by statute, other than a forfeiture or penalty.

Trespass; Injury; Fraud. *Third*, Within two years: An action for trespass upon real property; an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.

Libel; Assault; False Imprisonment; Penalty. *Fourth*, Within one year: An action for libel, slander, assault, battery, malicious prosecution, or false imprisonment; an action upon a statute for penalty or forfeiture, except where the statute imposing it prescribes a different limitation.

Bond. *Fifth*, An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer, or upon the bond or undertaking given in attachment, injunction, arrest, or in any case whatever required by statute, can only be brought within five years after the cause of action shall have accrued.

Other Relief. *Sixth*, An action for relief, not hereinbefore provided for, can only be brought within five years after the cause of action shall have accrued.

No proof on subject of payment could be received when there is no allegation of the time of payment. *Jones v. Eisler*, 3-139.

Actions of trespass upon real property are barred in two years. *K. P. Rly. Co. v. Muhlman*, 17-227.

Cause of action on account of fraud. Suit might be brought at any time within two years after discovery. *Claggett v. Crall*, 12-393.

A civil action brought by a county attorney in the name of the state, under the provisions of §18, ch. 128, L 1881, to enforce a lien for fines and costs upon real estate against the owner of premises, who has knowingly suffered a person to sell liquor thereon in violation of law, comes within subdivision 2 of §18 of the code, being an action upon a liability created by

statute, and is not barred by the fourth subdivision of said §18. *State v. Pfefferle*, 33-718.

Failure to legally exhibit claim on notes within three years after the granting of letters of administration. Failure to sue within three years after appointment of administrator. *Quere*, is not claim barred? *Clawson v. McCune*, 20-341.

Elliott v. Locknane, 1-125: That the limitation law of Feb. 12, 1858, applies to causes of action existing when it was passed, and that the time for commencing such actions was extended one year, sustained. *Root v. Bradley*, 1-437.

When the action on a note secured by mortgage is barred, an action on the mortgage is barred also. *Swenson v. Plow Co.*, 14-388.

The circumstances under which the fraud was discovered do not constitute any part of the cause of action, and need not be stated, even where a discovery must be alleged to avoid the apparent bar of the statute of limitations. (20-107.) *Ryan v. Railroad Co.*, 21-404.

(*Code 1859*, §21.) The statute of limitations of 1855 begins to run from the taking effect of the act, which is presumed to be about the 1st of September, 1855. Actions on contracts, obligations or liabilities, express or implied, must be brought within three years from that time. *Morton v. Sharkey*, McC.-114.

A limitation may be extended, where it has not already expired, but a contract which is already barred by existing laws cannot be revived. *Morton v. Sharkey*, McC.-114.

The legislature must give a reasonable time to bring suits on causes of action which are not barred by the existing law when the new one is enacted. *Morton v. Sharkey*, McC.-114.

Statutes of limitation do not run against any claim or demand, during any portion of the time while a suit is pending for the enforcement of such claim or demand. *Kothman v. Skaggs*, 29-14.

Action for recovery of taxes paid to county. The action, as we think, is "an action upon a liability created by statute, other than a forfeiture or penalty." Possibly in one sense it is also an action upon contract; but in no such sense, as we think, as is contemplated by the five-years' statute of limitations. We think the action, if not barred by the two-years' statute of limitations, is barred by the three-years' statute of limitations. *Richards v. Commissioners*, 28-336.

The limitation prescribed in the code of 1858, in actions for trespass to person, was one year. Such a cause of action accruing March 29, 1857, was barred before Feb. 8, 1859. *Smith v. Cline*, 3-506.

Action brought 1865, on claim arising in Ohio, accruing Oct. 1, 1854, where it was alleged that defendant absconded from that state, was not in Kansas prior to 1861, and then concealed himself, it was held, that the limitation act of 1855, except where suits had been commenced prior to April 1, 1858, was repealed by the second title of the code which then took effect. *Swickard v. Bailey*, 3-507.

A mortgage is included in §20, code 1859. *Chick v. Willetta*, 2-385.

(*Subd. 1.*) There is no language in the act approved Feb. 10, 1859, amendatory to the code, indicating an intention that it was made to apply to cases where the right of action had accrued more than two years before the law was passed; had such intention been expressed, the statute as to such cases would be void. *Auld v. Butcher*, 2-135.

(*Subd. 1.*) Where a note and mortgage have become barred by the statute of limitations, the payee thereof may revive the debt by part payment or otherwise, as against himself, but he cannot revive the note and mortgage, as against a third person to whom he has sold and conveyed the mortgaged property. *Hubbard v. Insurance Co.*, 25-172.

(*Subd. 1.*) Due bill barred in five years. *Douglass v. Sargent*, 32-414.

(*Subd. 2.*) Actions upon contracts made beyond, as well as those upon contracts made within, the limits of the state, are, in the absence of other provisions, included in §20, code 1859. Sec. 15, code, excepts the cases on foreign contracts mentioned in the act of Feb. 10; the limitations of the code do not apply to them. *Bonifant v. Doniphan*, 3-26.

(*Subd. 2.*) An action for a breach of a contract not in writing may be brought at any time within three years after the breach. *Howard v. Ritchie*, 9-102.

(*Subd. 2.*) Injury to employé of railroad company on account of the negligence of coemployé. Action against the railroad company is barred in two years. *A. T. & S. F. R. R. v. King*, 31-708.

(*Subd. 2.*) Action must be brought within two years after fraud is discovered. *Woodman v. Davis*, 32-347.

(*Subd. 3.*) Where a person is continuously in the open, notorious and undisturbed possession of personal property, for more than two years, all the time claiming to own the same, it becomes his by virtue of the two-years' statute of limitations; at least, as against all persons having knowledge of such possession, and claiming adversely. *Robbins v. Sackett*, 23-302; *Carter v. Pratt*, 23-617.

(*Subd. 3.*) An action for the injury to the rights of another, qualifies subdivision 2, as to an action on a liability created by statute. *A. T. & S. F. R. R. v. King*, 31-708.

(*Subd. 3.*) When an attorney, by false representations, conceals from his client the fact that he has collected the client's money, the cause of action does not accrue until the discovery of the fact. *Voss v. Bachop*, 5-60.

(*Subd. 3.*) Action against agent for fraud. The cause of action shall not be deemed to have accrued until the discovery of the fraud. *Perry v. Wade*, 31-428.

(*Subd. 3.*) Action against the heirs of an agent who fraudulently put the title of real estate of the principal in his name, to compel the heirs to convey, comes within the provisions of subd. 3, §18, and must be brought within two years after the discovery of the fraud. *Main v. Payne*, 17-609.

(*Subd. 3.*) This section applies to actions for damages founded on fraud, as well as to actions for equitable relief founded upon fraud. Where the petition shows the fraud upon which the action is founded was consummated more than two years before the commencement of the action, the plaintiff

must allege that he did not discover the fraud until within less than two years before the commencement of the action, or it will be bad on demurrer. *Young v. Whittenhall*, 15-579.

(*Subd. 3.*) Lumber sold February 19, 1870. Party may bring his action therefor on the 19th of February, 1873. *Hook v. Bixby*, 13-168.

(*Subd. 3.*) When the plaintiff alleges, in a suit to quiet title against tax deeds fraudulently obtained against his property, that the fraud was consummated more than two years prior to the commencement of the action, but fails to state when the fraud was actually discovered, the petition will be held defective on demurrer. *Doyle v. Doyle*, 33-723.

(*Subd. 3.*) Prior to 1868 the cause of action on fraudulent representations of title would not accrue till after the discovery of the fraud, and might be brought at any time within two years thereafter. *Claggett v. Crall*, 12-393.

(*Subd. 3.*) Action to enjoin canvass of votes for county-seat election. Subd. 3 of §18 of the code bars this action. The date fixed by law for the canvass of the votes cast at the election was Sept. 27, 1879, and in our opinion the cause of action accrued to the plaintiff the day fixed by law for the canvass. *Duffitt v. Tuhan*, 28-292.

(*Subd. 3.*) While under subd. 3, §18, an action for trespass upon real estate can be prosecuted at any time within two years after the trespass, yet when the treble damages given as penalty by said ch. 113 are sought to be recovered, the action must be commenced within one year. *Sullivan v. Davis*, 29-34.

(*Subd. 3.*) The evidence certainly warranted the court in making the affirmative finding as it did, that the "settlement was free from fraud or deception." But suppose that it was not free from fraud and deception: can it be supposed that G. did not discover the fraud until within two years next preceding the commencement of the action? And, therefore, even if fraud was committed, is not the plaintiff's claim barred? *Yeaman v. James*, 29-382.

(*Subd. 4—Code 1859, §23.*) An action brought by plaintiff against the defendant, for wounding him by the negligent discharge of a gun, is an action for a battery, and therefore comes within the provisions of §23 of the code of 1859, and should be brought within one year. *Laurent v. Bernier*, 1-428.

(*Subd. 5.*) Trespass by sheriff, levying on personalty and selling same. Action is barred in two years, and cannot be avoided by suing on the sheriff's bond. *Ryus v. Gruble*, 31-767.

(*Subd. 6.*) Said subdivision is a five-years' statute of limitations, which runs against causes of action only *after* they have accrued. *Fletcher v. Worthington*, 24-262.

(*Subd. 6.*) This applies to judgments. If a right of action exists on a judgment, and there is no other limitation provided for actions upon judgments, then this section furnishes such limitation; yet in this case this section will not be given such a construction that will absolutely cut off all rights of action, when the same had not been barred by previous statutes. *Burnes v. Simpson*, 9-666.

Sec. 18, subd. 6, held not to destroy right under § 20 of code of 1859. *Burnes v. Simpson*, 9-564.

(*Subd. 6.*) Revivals of judgments made in another state. In neither case can the revivals have any force or effect beyond the jurisdiction of the state of Pennsylvania, because at the time of such revivals the state of Pennsylvania did not have any jurisdiction of the person of the defendant, who was then in Kansas, and a *bona fide* resident of Kansas. *Kay v. Walter*, 28-117.

(3812) **§ 19. Disability.** If a person entitled to bring an action other than for the recovery of real property, except for a penalty or forfeiture, be, at the time the cause of action accrued, under any legal disability, every such person shall be entitled to bring such action within one year after such disability shall be removed.

Action for rents and profits, brought by minor as soon as he arrives at age of 21, is not barred. *Scantlin v. Allison*, 32-380.

(3813) **§ 20. Commencement of Action.** An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a co-defendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days.

Where a *bona fide* attempt to commence a proceeding in error is made by filing a petition in error and case-made, as was done in the present case, and having summons issued thereon, such act should be deemed and held equivalent to the commencement of such proceedings in error, provided, of course, that the plaintiff in error should faithfully, properly and diligently follow up his attempt by obtaining service upon the defendant in error within sixty days after the filing of the petition. *Thompson v. Wheeler, &c.*, 29-481.

In an action to enforce a mechanic's lien, the owner of the lot had conveyed the same away before suit; summons served on him thereafter. *Held*, That he was not so united in interest with the purchaser that the action could be deemed commenced as to F. at the date of summons served on the original owner. *Rice v. Simpson*, 30-29.

Where the right of action was barred July 8th, 1861, and a summons was issued March 23, 1861, but not served on defendant, plaintiff in error, August 21, 1863, when the records were destroyed: *Held*, That there is not presented a case as to which the general limitation of actions was sought to be suspended by § 19, act Feb. 9, 1864, for records Douglas county. *Searle v. Adams*, 3-515.

Of course an attachment cannot rightfully be issued before the action (of which it is only an incident) is commenced. But we do not think that the attachment in this case was issued before the action was commenced. The action was commenced when the petition and preceipe were filed, and when the summons was issued. Section 20 of the civil code has application only to the statute of limitations. * * * *Dunlap v. McFarland*, 25-490.

(3814) **§ 21. Absence; Absconding; Limitation.** If, when a cause of action accrues against a person, he be out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought.

Reply to plea of statute of limitations says, that defendant was a non-resident corporation existing under the laws of Missouri. Not error to refuse to charge the jury to find for defendant. *N. M. R. R. Co. v. Akers*, 4-454

(*Code 1862*, § 28.) Action on note, in Missouri, May 30, 1860, due one year suit commenced July 31, 1863. The defendant makers have been non-residents and absent from Kansas for two years. Cause of action not barred. *Bonifant v. Doniphan*, 3-26.

Under the provisions of § 26, ch. 26, C. L., the time of absence of United States senator from this state, attending to his duties and other business, should be excluded from computation of time of limitation. *Lane v. Nat'l Bank*, 6-74.

The question of presence or absence from the state, and not the question of residence or non-residence, affects the running of the statute, under § 21 of the code. Absconding and concealing, as used in the last-named section, refer to such conduct only as prevents service of process in this state. *Hoggett v. Emerson*, 8-262.

It is urged that the petition upon its face shows that the cause of action, if any existed in favor of the plaintiff, was long since barred by the statute. We do not think the point well taken. The defendant is a foreign insurance company, and is a non-resident of the state, and service was had thereon by a summons directed to the superintendent of insurance, under the provisions of § 41, ch. 50, p. 493, C. L. 1879. The statute does not begin to run in favor of a non-resident until he comes into the state. *Ætna Ins. Co. v. Koons*, 26-218.

Limitations in favor of a tax deed do not apply when the owner is a non-resident. *Case v. Frazier*, 31-689; *Walker v. Boh*, 32-358.

The word "conceal" refers to acts of the party within this state. *Frey v. Aultman*, 30-181.

(3815) **§ 22. Laws other States; Limitation.** Where the cause of action has arisen in another state or country, between

non-residents of this state, and, by the laws of the state or country where the cause of action arose, an action cannot be maintained thereon, by reason of lapse of time, no action [can be] maintained thereon in this state; * [and no action shall be maintained in this state on any judgment or decree rendered in another state or country against a resident of this state, where the cause of action upon which such judgment or decree was rendered could not have been maintained in this state at the time the action thereon was commenced in such other state or country, by reason of lapse of time.] [§ 22, as amended, L. 1870, ch. 87, § 1; took effect May 12, 1870.]

* Latter clause held void. *Dodge v. Coffin*, 15-277.

By virtue of § 29, code 1859, an action in this state is prohibited upon claims barred by the law of another state where the cause of action arose. *Swickard v. Bailey*, 3-507.

The limitation laws of other states may, by § 22, in some cases reduce the limitations prescribed by the code, but can never extend them. *Hoggett v. Emerson*, 8-262.

(3816) **§ 23. New Action ; Limitation.** If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die, and the cause of action survive, his representatives, may commence a new action within one year after the reversal or failure.

This section operates simply to continue alive a right of action for one year after failure of prior action otherwise than upon the merits, and was not intended to limit the general power of transfer of rights of action founded upon contract, or the right of the transferee to sue in his own name. *Shively v. Beeson*, 24-352.

However, as F. dismissed his action on the 6th day of September, 1880, he failed in such action otherwise than upon its merits, and he had the right to commence a new action within one year after the dismissal. *Thornburgh v. Cole*, 27-498.

Voluntary dismissal without prejudice, comes within the saving clause of this section. *McWhirt v. McKee*, 6-419.

A stipulation signed by the attorneys of both parties, made at the time of dismissing the first action, "that it should be without prejudice of service or otherwise to the action commenced this day by J. H. v. D. A. and G. W. T.," is not a stipulation that the statute of limitations should not be relied on by defendant, nor that defendant might not insist that the second action was not saved under § 23 of the code. *Hiatt v. Auld*, 11-176.

(3817) **§ 24. Payment or Acknowledgment; Reviving.** In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of

an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby.

The acknowledgment of a debt required to take a claim out of the statute of limitations must be in writing, and signed by the party to be charged thereby. *Green v. Goble*, 7-297.

Sec. 24 of the civil code provides three ways by which an action on contract, after it has become barred as well as before, may be taken out of the operation of the statute: 1, By the payment of part of the principal or interest; 2, By an acknowledgement in writing of an existing liability, debt or claim, signed by the party to be charged; 3, By a promise of payment in writing, signed by the party to be charged. The statute does not require that all of these things shall exist before a cause of action is taken out of the operation of the statute, but only requires that some one of them shall exist. "I do not want to be held longer on that note"—in a letter. Did he not in fact say, although not in the most direct form, that his liability still continued? And if he did say this, it would seem to be all that was necessary to revive the debt. *Elder v. Dyer*, 26-610.

(*Code 1859, § 31.*) In this case the payment (if such it may be regarded) is made, not by the joint contractor, but by the administrator of his estate, under direction of the probate court; and it has, we think, been constantly held, both in England and America, that where the community of interest had been severed by the death of a joint contractor, such admissions of a co-contractor would not bind the executor or administrator, nor those of the executor or administrator the co-contractor. *Root v. Bradley*, 1-443.

A petition showing the cause of action is barred is bad, and a defendant in default may appear at the trial and object to the sufficiency of the petition. *Zane v. Zane*, 5-135.

Oral acknowledgement by administrator, or promise to pay, does not suspend running of statute of limitations. *Clawson v. McCune*, 20-343.

As to principal and surety, payment suspends the running of the statute only as against the party making the payment. *Steele v. Souder*, 20-42.

Note partly paid by assignee of maker for benefit of creditors, is such a payment as under § 24 avoids the bar of the statute. *Letson v. Kenyon*, 31-302.

Statutes of limitation are statutes of repose. *Taylor v. Miles*, 5-499; *Elder v. Dyer*, 26-604.

Partial payments made by one debtor will not suspend the running of the statute in favor of other debtors on the same obligation. *Steele v. Souder*, 20-39.

An acknowledgement of a debt, to take the case out of the statute of limitations, must be made, not to a mere stranger, but to the creditor, or some one acting for or representing him. *Sibert v. Wilder*, 16-176.

Note partly paid by maker's assignee, being one made in pursuance of express directions from the assignor, for his benefit, and out of the proceeds of his property, is such a payment as under § 24 of the code avoids the bar of the statute of limitations. *Gragg v. Barnes*, 32-302.

County having paid interest on a debt which has been due over five years, and also within the time in writing acknowledged its liability to pay such debt, the same is not barred by the five-years' statute. *Commissioners v. Higginbotham*, 17-82.

(3818) **§ 25. Bar; Limitations.** When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense.

Said statute of limitations makes the personal property hers in any action, whether she be plaintiff or defendant. *Robbins v. Sackett*, 23-305.

Void tax deed, land not subject to sale, gives the holder no right to the premises, though the deed is duly recorded over two years, and the land vacant. *Taylor v. Mills*, 5-506.

ARTICLE 4—PARTIES TO CIVIL ACTIONS.

SEC.

26. Action to be prosecuted in name of party in interest.

27. Assignment not to prejudice a defense.

28. Executor, trustee, etc., may sue without joining beneficiary.

29. Married women may sue and be sued.

30. Husband and wife, defense by.

31. Action by infant plaintiff, how to be brought.

32. Liability of guardian for costs, etc.

33. Infant defendant, defense by.

34. Guardian, how appointed.

35. Who may be joined as plaintiffs.

36. Who may be made defendants.

37. Parties united in interest must be joined.

38. One may sue or defend for benefit of all, when.

SEC.

39. Persons severally liable may be sued at option of plaintiff.

40. Action does not abate by death, marriage, etc.

41. General rule as to who must be parties.

42. Person interested in real or personal property may be made party, when.

43. How order obtained for safe-keeping, etc., of property claimed by third person, and how latter brought in, barred, etc.

44. Sheriff to have benefit of preceding section.

45. In action against officer for property, plaintiff in execution may be substituted.

45a. Interpleader.

45b. Costs.

(3819) **§ 26. Plaintiff; Party in Interest.** Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section twenty-eight; but this section shall not be deemed to authorize the assignment of a thing in action, not arising out of contract.

Any right under a contract, either expressed or implied, may be transferred. This is so whether the amount of the contract is due at the time of the assignment or to become due thereafter. *Krapp v. Eldridge*, 33-108.

The assignee of a void mortgage, executed to lift a valid mortgage, may be

subrogated to all the rights of the original mortgagee, if there be no intervening liens or incumbrances. *Everston v. Central Bank*, 33-362.

Where it appears that a suit is instituted in the name of the state, without any authority of law, or the consent of the attorney general, is the state properly in court? *State v. Anderson*, 5-91.

If the injury is one that peculiarly affects a person, he has his right of action; if it affects the whole community alike, their remedy is by proceedings by the state through its appointed agencies. *Craft v. Jackson Co.*, 5-520.

A person, after arriving at full age, may maintain an action in his name against his guardian and sureties on the bond, although the bond was executed in the name of the state of Kansas as obligee. *Crowell v. Ward*, 16-60.

State cannot maintain action of injunction to restrain county treasurer from proceeding to collect tax which was levied to pay off bonds, which were void in hands of holders, issued by a school district in excess of its powers, a tax having been levied to pay them off, and the tax roll being in the hands of the treasurer; the taxpayers had, without multiplicity of suits, adequate remedy. *State v. McLaughlin*, 15-228.

A note payable to order, as well as every other kind of promissory note, may be transferred in the state without any indorsement, or without any written instrument, and by delivery merely, and so as to authorize the transferee to sue in his own name. (3-295; 11-465.) *Washington v. Hobart*, 17-277.

Where an action in the nature of *quo warranto* has been commenced by the county attorney, in the name of the state of Kansas, for the purpose of ousting certain persons who have unlawfully usurped certain offices, there is no defect of parties plaintiff. *Bartlett v. State*, 13-99.

Where S. executed to A. two notes and a mortgage to secure their payment, and A. afterward assigned one of the notes to M.: Held, That A. and M. cannot sue jointly as plaintiffs on the notes and mortgage, but each has his separate action. *Swenson v. Plow Co.*, 14-387.

County commissioners may sue on county treasurer's bond for all moneys received by virtue of his office, whether belonging to the state, county, township, school or other fund. *Commissioners v. Craft*, 6-152.

The statutes do not anywhere provide that an action of mandamus may be prosecuted in the name of the state, when prosecuted by a private individual. *State v. Marston*, 6-532.

The spirit of the code requires that, so far as possible, all controversies concerning a particular subject-matter shall be concluded by one proceeding, and it is made the duty of the court to have all appearing to be interested therein made parties. *Kimball v. Connor*, 3-415.

✓ (Code 1859, § 32.) A mere delivery for a valuable consideration of a negotiable note, without written endorsement or assignment, will pass the title; and any beneficial interest in the proceeds, as where it has been transferred as collateral security, will enable the holder to sue in his own name, and will constitute him the real party in interest. *Williams v. Norton*, 3-295.

Each class of persons may be benefited by having its own class relieved from paying taxes; but no class of persons could receive any possible benefit

from having some other class of persons, differing wholly from its own class, relieved from paying taxes. Only such parties as are united in interest should be made plaintiffs in any action. (12-140; 14-387; 24-127.) *McGrath v. City of Newton*, 29-371.

A note payable in work has been sold and delivered to a third party; the latter can maintain an action thereon in his own name. *Schnier v. Fay*, 12-184.

The action of mandamus, as well as every other civil action, should, under the statutes of Kansas, where no special provision is otherwise made, be brought and prosecuted in the name of the real party in interest. (6-524.) *State v. Commissioners*, 11-70.

Action on the bond of a treasurer of a school district must be brought by the district and not by the present treasurer. *Coffman v. Parker*, 11-12.

Under our statutes every chose in action is assignable except a tort, the same as it was in equity. * * * A negotiable promissory note, if payable to order, can be assigned free from all equities only by indorsement. *McCrum v. Corby*, 11-470.

A claim for money tortiously obtained from the claimant may be assigned to a third person, so as to give the assignee the right to recover the same in his own name. *Stewart v. Balderston*, 10-143.

(3820) **§ 27. Assignee; Set-Off.** In the case of an assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defense now allowed; but this section shall not apply to negotiable bonds, promissory notes, or bills of exchange, transferred in good faith and upon good consideration, before due.

In an action by assignee of non-negotiable note, assigned for a valuable consideration before maturity, the defendant may set up and prove any defense going to the consideration, which he would be permitted to make if the action were by the payee. *Graham v. Wilson*, 6-489.

(*Laws 1855, §§ 3, 4.*) Under the statutes of 1855, "no consideration" could be plead as a defense to the note in the hands of the assignee. *Stone v. Young*, 4-17.

Any right under a contract, either expressed or implied, may be transferred. This is so, whether the amount of the contract is due at the time of the assignment, or to become due thereafter. *Krapp v. Eldridge*, 33-108.

(3821) **§ 28. Executor, Trustee, Plaintiff.** An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way.

Where, by consent of all the parties interested, a promissory note is exe-

cuted to one in trust for others, the payee may maintain an action in his own name. *Scantlin v. Allison*, 12-85.

Action on the bond of a treasurer of a school district should be brought by the district. *Coffman v. Parker*, 11-12.

County commissioners may sue on county treasurer's bond for all moneys received by virtue of his office, whether belonging to state, county, township, school, or other fund. *Commissioners v. Craft*, 6-152.

Presumably and confessedly, the action was brought in the name of the wrong person—in the name of a person who never had any interest in the note, and in whose name the action should not have been brought; and if so, the defendants could not be liable for any of the costs in such action. *Fisher v. Stockebrand*, 26-572.

As C. had transferred in writing this account to E., it was immaterial to K. whether he had given it to him or sold it to him. After such transfer and assignment, E. was the only person entitled to maintain an action therefor. *Krapp v. Eldridge*, 33-108.

As the contract of insurance was made with J. L. D., his executors, administrators and assigns, it is claimed that the administratrix alone can sue. If suit can be maintained at all by the administratrix, it can only be as trustee of the widow and children of the deceased, who were alone interested in the fund sued for, but whether it can be brought in the name of the administratrix, we need not and do not now decide. *Continental Ins. Co. v. Daly*, 33-609.

We are of the opinion that, under § 23 of the code, the action in the court below, for the recovery of the alleged defaults and deficits belonging to the various funds received by Munger, as county treasurer, cannot be maintained in the name of the board of commissioners of the county of Harvey. The statute does authorize, however, the action to be brought in the name of the state, the obligee named in the bond, for all such delinquencies. *Commissioners v. Munger*, 24-209.

(3822) **§ 29. Married Woman Plaintiff.** A married woman may sue and be sued in the same manner as if she were unmarried.

Married women may sue and be sued, same as any other person. *Knaggs v. Mastin*, 9-547.

A married woman may maintain an action in her name in this state. *Furrow v. Chapin*, 13-112.

A married woman may sue in her own name separately, if she is the only party in interest. *Crowell v. Ward*, 16-61.

(3823) **§ 30. Wife; Defense.** If a husband and wife be sued together, the wife may defend for her own right; and if her husband neglect to defend, she may defend for his right also.

(3824) **§ 31. Infant.** The action of an infant must be brought by his guardian or next friend. When the action is brought by

his next friend, the court has power to dismiss it, if it is not for the benefit of the infant, or substitute the guardian of the infant, or any person, as to the next friend.

Consent entered on the docket to allow minor to sue is not binding on the parties. Minor must sue by his guardian or next friend. *Sutton v. Nichols*, 20-45.

The true rule seems to be, that whenever a minor not in court seeks affirmative relief, such minor has a right to institute any action or proceeding, appearing therefor by her next friend or guardian; such appearance, while not wholly within the strict letter of the statute, is clearly within its spirit, and is necessary for the rights of a minor. *Burdette v. Corgan*, 26-105.

(3825) **§ 32. Guardian; Costs; Witness.** The guardian, or next friend, is liable for the costs of the action brought by him, and when he is insolvent, the court may require security for them. Either may be a witness in an action brought by him.

(3826) **§ 33. Infant Defendant.** The defense of an infant must be by a guardian for the suit, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or by a probate judge. The appointment cannot be made until after the service of the summons in the action, as directed in this code.

A guardian *ad litem* for a minor defendant should at least deny in his answer all the material allegations of the petition prejudicial to such defendant. *Brenner v. Bigelow*, 8-497.

It is error for the district court to appoint a guardian *ad litem* for a minor, and render judgment against such minor, where said minor makes no appearance in the case, and where the only service of summons upon him was by publication upon an insufficient affidavit. *Claypoole v. Houston*, 12-324.

Sec. 33 of the code is referred to, which provides that the defense of an infant must be made by the guardian for the suit, who cannot be appointed till after service of the summons. She was never served, and no guardian was ever appointed. The motion which was filed shows that this minor appeared by her next friend, and as that is the form in which an action by a minor is to be brought, (§ 31), it is insisted on the other hand that she can in the same way appear in the court whenever she seeks affirmative relief, as in the case at bar. This, we think, is the true construction of the statute. *Burdette v. Corgan*, 26-105.

(3827) **§ 34. Guardian ad Litem.** The appointment may be made upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after the return of the summons. If he be under the age of fourteen, or neglect so to apply, the appointment may be made upon the application of any friend of the infant, or on that of the plaintiff in [the] action.

An infant cannot appear by attorney, or waive service of process, but must be served, have a guardian appointed, and defend by him. The code adopts the common law on this subject. McC.-169.

(3828) **§ 35. Joinder.** All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this article.

Only such parties as are united in interest should be made plaintiffs in any action. McGrath v. City of Newton, 29-371.

It is not enough, under the section quoted, that all the plaintiffs should have an interest in the subject of the action; it is essential that they should all have an interest in obtaining the relief granted. Jeffers v. Forbes, 28-178.

A mortgage was executed by two as a security for a note signed by one, and these were obtained by fraud. *Held*, That both could join in a suit to have the note and mortgage canceled. Bowman v. Gerny, 23-309.

Different claimants, under the mechanic's lien law, ought not to be joined as plaintiffs. Harsh v. Morgan, 1-293.

(3829) **§ 36. Defendants; Parties.** Any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.

In an action to dissolve a corporation, refusal to allow a stockholder to file a petition to be made a party defendant, and set up a defense of fraud and collusion, not error, the judgment not dissolving the corporation, but only for costs. Roller v. Snodgrass, 14-584.

The ordinary rules applicable to granting leave to parties to file answers, do not prevail in cases of receivers. Patrick v. Eells, 30-686.

Cited, but not passed on. Scarborough v. Smith, 18-407.

(3830) **§ 37. Parties Plaintiff, Defendant; Interest.** Of the parties to the action, those who are united in interest must be joined, as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason being stated in the petition.

Only such parties as are united in interest should be made plaintiffs in any action. McGrath v. City of Newton, 29-371.

While at common law the misjoinder of any other party as plaintiff with the party or parties whose legal right only had been affected, would have been good cause for demurrer, it is not one of the enumerated causes for demurrer under the code; but perhaps a misjoinder of plaintiffs would, under the code, be within the six enumerated causes for demurrer. Bowman v. Gerny, 23-309.

When an estate has a right of action, and one of the administrators re-

fuses to join as plaintiff in bringing the suit, the other may bring the action, making his co-administrator a defendant, and giving in the petition the reason therefor. *Rizer v. Gilpatrick*, 16-564.

(3831) **§ 38. Parties Numerous.** When the question is one of common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue for the benefit of all.

Allegation "that the question involved in this case is one of common or general interest to many persons, that the parties are very numerous, and it is impracticable to bring them all before the court," is not sufficient. He must allege and show that the other parties and himself have some special interest in the matter. *Troy v. Commissioners*, 32-512.

Only such parties as are united in interest should be made plaintiffs in any action. *McGrath v. City of Newton*, 29-371.

If the petition does not show that the plaintiff has such an interest in the town site as makes him an occupant within the meaning of the law, a demurrer thereto should be sustained. *Winfield v. Maris*, 11-128.

(3832) **§ 39. Defendants Severally Liable.** Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and indorsers and guarantors, may all or any of them be included in the same action, at the option of the plaintiff.

Any one or more or all the several makers of a promissory note may be sued thereon in one action, although the note be joint in form and not several, or joint and several, and if all are sued in one action, the plaintiff may dismiss his action as to any one or more of the defendants, and proceed with his action as against the other defendants. *Whittenhall v. Korber*, 12-618.

A member of a firm who signs the firm name as surety to a note, by a clerk, is personally liable, and if suit is against the others not liable, it may be dismissed as to them and prosecuted as to him. *Silvers v. Foster*, 9-60.

A maker and a guarantor of a note may be joined as defendants in one suit. *Hendrix v. Fuller*, 7-339.

Where one of two contractors is a resident of the state, and the other a non-resident, an attachment may be sued out and maintained against such non-resident. *Jefferson County v. Swain*, 5-382.

(3833) **§ 40. Death of Party; Assignment of Interest.** An action does not abate by the death or other disability of a party, or by the transfer of any interest therein, during its pendency, if the cause of action survive or continue. In case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made, to be substituted in the action.

Where the plaintiff in an action on a note and mortgage assigns the same to a third person, and afterward dies, it is error to allow such action to be prosecuted to final judgment in the name of the administrator of said plaintiff *Reynolds v. Quaely*, 18-361.

Sec. 23 of the code operates simply to continue alive a right of action for one year after failure of prior action otherwise than upon the merits, and was not intended to limit the general power of transfer of rights of action founded upon contract, or the right of the transferee to sue in his own name. *Shively v. Beeson*, 24-358.

(3834) § 41. **Parties Necessary.** The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.

The ordinary rules applicable to granting leave to parties to file answers, do not prevail in cases of receivers. *Patrick v. Eells*, 30-686.

(*Code 1859*, § 47.) In an action brought by B. against G., in which lands claimed by W. were attached as the property of G., *held*, that an order making W. a party defendant, and who set up his claim to the land, and obtained a verdict, was error, and not authorized by § 47. *Boston v. Wright*, 3-227.

Cited, but not passed on. *Scarborough v. Smith*, 18-407.

(3835) § 42. **Party.** When, in an action for the recovery of real or personal property, any person having an interest in the property applies to be made a party, the court may order it to be done.

Replevin suit against officer for property taken on execution; the plaintiff in the execution is afterward made a defendant, but not in lieu or substituted for the officer, and the petition is not amended as to him, and said new party does not set up any ground for or ask any affirmative relief; a joint judgment against the sheriff and said new party for \$225 and costs is erroneous as to said new party. *Furrow v. Chapin*, 13-107.

(3836) § 43. **Defense; Claimant; Fund.** Upon affidavit of a defendant, before answer, in any action upon contract, or for the recovery of personal property, that some third party, without collusion with him, has or makes a claim to the subject of the action, and that he is ready to pay or dispose of the same, as the court may direct, the court may make an order for the safe-keeping, or for the payment, or deposit in court, or delivery of the subject of the action, to such persons as it may direct, and an order requiring such third party to appear, in a reasonable time, and maintain or relinquish his claim against the defendant. If such third party, being served with a copy of the order, by the sheriff, or such other person as the court may direct, fail to appear, the court may declare him barred of

all claim in respect to the subject of the action, against the defendant therein. If such third party appear, he shall be allowed to make himself defendant in the action, in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of the court for the payment, deposit or delivery thereof.

Joint judgment against officer and plaintiff in execution, erroneous in this case. *Furrow v. Chapin*, 13-107.

The remedy given by § 43 of the civil code does not supersede the action of interpleader, but in cases where such remedy might be substituted for the action of interpleader, the two remedies are concurrent. *Board Education v. Scoville*, 13-30.

Suit in replevin against sheriff; on motion of execution creditor he was also made party defendant. The court erred in rendering a judgment jointly in favor of the defendants. They had no joint interest in the property. But this was immaterial error. *Hall v. Jenness*, 6-365.

(3837) **§ 44. Sheriff; Exoneration.** The provisions of the last section shall be applicable to an action brought against a sheriff or other officer, for the recovery of personal property, taken by him under execution, or for the proceeds of such property so taken and sold by him; and the defendant in any such action shall be entitled to the benefit of those provisions against the party in whose favor the execution issued, upon exhibiting to the court the process upon which he acted, with his affidavit that the property, for the recovery of which, or its proceeds, the action is brought, was taken under such process.

Joint judgment against officer and plaintiff in execution, error in this case. *Furrow v. Chapin*, 13-107.

Suit in replevin against sheriff; on motion of execution creditor he was also made party defendant. The court erred in rendering a judgment jointly in favor of the defendants. But this was immaterial error. *Hall v. Jenness*, 6-365.

The remedy of § 43 does not supersede the action of interpleader, but in cases where such remedy might be substituted for the action of interpleader, the two remedies are concurrent. *Board of Education v. Scoville*, 13-30.

(3838) **§ 45. Replevin; Officer; Party; Substitution.** In an action against a sheriff or other officer, for the recovery of property taken under an execution and replevied by the plaintiff in such action, the court may, upon application of the defendant and of the party in whose favor the execution issued, permit the latter to be substituted as the defendant, security for the cost being given.

In an action against a sheriff for the recovery of property taken under an execution and replevied by the plaintiff in such action, the sheriff is not

only the actual but the real party defendant, where the judgment creditor makes no application to be made defendant and is not substituted as the defendant. *Hoisington v. Brakey*, 31-560.

Suit in replevin against sheriff; on motion of execution creditor he was also made party defendant. The court erred in rendering a judgment jointly in favor of the defendants. They had no joint interest in the property. But this was immaterial error. *Hall v. Jenness*, 6-365.

Joint judgment against officer and plaintiff in execution, error in this case. *Furrow v. Chapin*, 13-107.

(3839) § 45a. **Interpleader.** Any person claiming property, money, effects or credits attached, may interplead in the cause, verifying the same by affidavit, made by himself, agent or attorney, and issues may be made upon such interpleader and shall be tried as like issues between plaintiff and defendant, and without any unnecessary delay. [L. 1877, ch. 137, § 1; took effect March 10, 1877.]

It is immaterial in the consideration of this case, whether the claimant proceeded before the justice under the provisions of ch. 164, L. 1872, or ch. 137, L. 1877. And it is immaterial whether an appeal would lie in the case or not. *Edwards v. Ellis*, 27-347.

Where property is attached in the hands of a third person, and such third person, together with the defendant in the action, gives a forthcoming bond to the plaintiff for the property, under § 199: *Held*, That such third person is not estopped from afterward claiming the property as his own by interplea, unless the property has been delivered to such third person, or to the defendant by the officer, in pursuance of such bond. *Case v. Shultz*, 31-96.

This section is constitutional, and applies to real estate. *Bennett v. Wol-
verton*, 24-284.

(3840) § 45b. **Costs; Interplea.** In all cases of interpleader, costs may be adjudged for or against either party, as in ordinary cases. [L. 1877, ch. 137, § 2; took effect March 10, 1877.]

ARTICLE 5—THE COUNTY IN WHICH ACTIONS ARE TO BE BROUGHT.

SEC.

46. What actions relating to property, local.
47. Exceptions.
48. Other local actions.
49. Where to be brought against a corporation generally.
50. Against railroad company, etc.

SEC.

51. Against turnpike company.
52. Exception.
53. Against non-resident.
54. For divorce.
55. Other actions.
56. Venue changed, when.

(3841) § 46. **Actions; Venue; Realty; Partition; Liens.** Actions for the following causes must be brought in the county in which the subject of the action is situated, except as provided in section forty-seven:

First, For the recovery of real property, or of any estate or

interest therein, or for the determination in any form of any such right or interest.

Second, For the partition of real property.

Third, For the sale of real property under a mortgage, lien or other incumbrance or charge.

Action to foreclose a mortgage must be brought in the county where the land is situated. *Shields v. Miller*, 9-397; *App v. Bridge*, McC.-118.

(3842) **§ 47. Exceptions; Venue; Realty; County.** If the real property, the subject of the action, be an entire tract, and situated in two or more counties, or if it consists of separate tracts, situated in two or more counties, the action may be brought in any county in which any tract or part thereof is situated, unless it be an action to recover possession thereof; and if the property be an entire tract, situated in two or more counties, an action to recover the possession thereof may be brought in either of such counties; but if it consists of separate tracts in different counties, the possession of such tracts must be recovered by separate actions, brought in the counties where they are situated. An action to compel the specific performance of a contract of sale of real estate, may be brought in the county where the defendants, or any of them, reside.

(3843) **§ 48. Local Actions.** Actions for the following causes must be brought in the county where the cause, or some part thereof, arose:

Fine; Penalty. *First*, An action for the recovery of a fine, forfeiture or penalty, imposed by a statute, except that when it is imposed for an offense committed on a river or other stream of water, or road, which is the boundary of two or more counties, the action may be brought in any county bordering on such river, water-course or road, and opposite to the place where the offense was committed.

Officer. *Second*, An action against a public officer for an act done by him in virtue or under color of his office, or for a neglect of his official duties.

Bond. *Third*, An action on the official bond or undertaking of a public officer.

But where the action is against the officer and his sureties upon his official bond, we should think that the action might properly be commenced in the county where the cause of action arose—that is, in the county where the breach of the bond was committed; and that the court from which the writ was issued would not have the sole and exclusive jurisdiction, even if it had jurisdiction at all. *Fay v. Edmiston*, 28-109.

Suits against public officers must be brought in the county where the acts are performed. *Clay v. Hoysradt*, 8-74.

The supreme court has jurisdiction in *quo warranto* when the cause of action arose in Jefferson county. State v. Allen, 5-220.

(3844) **§ 49. Against Corporation; Venue.** An action, other than one of those mentioned in the first three sections of this article, against a corporation created by the laws of this state or of the territory of Kansas, may be brought in the county in which it is situated, or has its principal office or place of business, or in which any of the principal officers thereof may reside, or may be summoned; but if such corporation be an insurance company, the action may be brought in the county where the cause of action, or some part thereof, arose.

(3845) **§ 50. Carrier; Venue.** An action against a railroad company, or an owner of a line of mail stages or other coaches, for any injury to persons or property upon the road or line, or upon a liability as a carrier, may be brought in any county through or into which said road or line passes.

(3846) **§ 51. Turnpike Company; Venue.** An action, other than one of those mentioned in the first three sections of this article, against a turnpike road company, may be brought in any county in which any part of the road lies.

(3847) **§ 52. Corporation; Exception.** The provisions of this article shall not apply in the case of any corporation created by a law of this state or the territory of Kansas, whose charter prescribes the place where, alone, a suit against such corporation may be brought.

(3848) **§ 53. Non-Resident; Venue.** An action, other than one of those mentioned in the first three sections of this article, against a non-resident of this state or a foreign corporation, may be brought in any county in which there may be property of, or debts owing to, said defendant, or where said defendant may be found; but if said defendant be a foreign insurance company, the action may be brought in any county where the cause, or some part thereof, arose.

(Code 1862, § 59.) Suit against non-resident, and attachment sent to another county and levied; subsequently an attachment is obtained on same property by another creditor in the county where the property is, and then the first creditor procures the defendant to come to the first county, and serves process there. The second attaching creditor has the first lien. Carney v. Taylor, 4-178.

If a non-resident corporation appears and submits its case to the court, it is too late to question want of jurisdiction. N. M. R. R. v. Akers, 4-470.

(3849) **§ 54. Divorce; Venue.** An action for a divorce may be brought in the county of which the plaintiff is an actual resident at the time of filing the petition.

The permanent and absolute home of the plaintiff, and not his temporary and official home, is his residence or actual residence within the meaning of the divorce statutes. *Carpenter v. Carpenter*, 30-717.

(3850) **§ 55. Venue; Other Actions.** Every other action must be brought in the county in which the defendant, or some one of the defendants, reside or may be summoned.

Before a summons can be rightfully issued from one county to another, the persons served with the summons in the county in which the action is brought must have some real and substantial interest in the subject of the action adverse to the plaintiff, and against whom some substantial relief may be obtained; and the action must be rightfully brought in the county in which it is brought, and as against the person served with summons in such county. *Rullman v. Hulse*, 33-670.

In no case can an action for money on a note or other joint and several contract be brought outside the county where the defendant resides or may be summoned, by merely uniting with him as co-defendant some unreal or imaginary party, against whom no judgment could be properly rendered. And if, in such a case, the defendant who was served with summons in the county where the action was brought obtains a judgment in his favor, or if the plaintiff voluntarily dismisses his action as to him, it will be presumed that such defendant was not a proper party. *Brenner v. Egley* 23-123.

Where one of two defendants, in the county in which suit is brought, acknowledges service on the back of the summons, a summons for the other defendant may rightfully issue to another county. *Hendrix v. Fuller*, 7-337.

By the code, it was provided that suits such as this should be brought in the county in which defendant resided or might be summoned. *Sattig v. Small*, 1-177.

Has no application to foreclosure suits. *Shields v. Miller*, 9-398.

Action wrongfully commenced against resident of county, process should not issue to another county against other defendant. *Rullman v. Hulse*, 32-600.

(3851) **§ 56. Venue, Change of.** In all cases in which it shall be made to appear to the court that a fair and impartial trial cannot be had in the county where the suit is pending, or when the judge is interested or has been of counsel in the case or subject-matter thereof, or is related to either of the parties, or is otherwise disqualified to sit, the court may, on application of either party, change the place of trial to some county where such objection does not exist. [L. 1870, ch. 87, § 2 (§ 56, as amended); took effect May 12, 1870.]

The granting of change of venue by the district court, is probably to a great extent a matter of judicial discretion; but the granting of a change of venue by a justice of the peace is purely a ministerial act. *Herbert v. Beathard*, 26-752.

Possibly a change of venue may be had, or a judge *pro tem.* elected, on account of prejudice of the regular judge, even in civil cases. Peyton's Appeal, 12-407.

"May" means "must," here. K. P. Rly. v. Reynolds, 8-629.

ARTICLE 6—COMMENCEMENT OF A CIVIL ACTION.

SEC.

57. Civil action, how commenced.
58. Parties entitled to copies of pleadings or other papers.
59. Summons to issue; requisites of.
60. Summons shall be issued to other county, when.
61. Time of service; returnable, when.
62. Other writs may be issued, when.

SERVICE OF SUMMONS—ACTUAL SERVICE.

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64. How.
65. Return must state, what.
66. Must be made, when.
67. What equivalent to service.
68. How served on corporation generally.
- 68a. Duty of certain corporations.
- 68b. The same; service of process upon.
- 68c. Neglect to designate; how process served.
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SEC.

69. On insurance company.
70. On foreign corporation.
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CONSTRUCTIVE SERVICE.

72. Service by publication.
73. Affidavit necessary.
74. Publication, how made.
75. When service complete, how proved; default not to be entered until proof made.
76. Personal service out of state.
77. Opening judgment on publication; effect on purchaser.
78. How to proceed against unknown heirs.
79. Proceedings against defendants when not all served.
80. Action against co-defendant not barred.
81. Filing petition; notice of action pending.
82. Record of judgment to be made in county in which part of real property is situated.

(3852) **§ 57. Commencement of Action.** A civil action may be commenced in a court of record, by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon.

Where an order of attachment is issued at the commencement of an action, and the clerk fixes the return day thereof at twenty days from its date, instead of within ten days, as prescribed by law, the order of attachment is not void for that reason, and the sheriff may serve the same at any time within ten days from its date. *Smith v. Payton, 13-364.

(3853) **§ 58. Petition; Copy.** A copy of the petition need not accompany the summons, but the defendant or plaintiff shall be entitled to a copy of the petition, or any other paper filed in the action, upon application to the clerk therefor; and the costs of such copy shall be taxed among the costs in the action.

(3854) **§ 59. Summons; Precipe.** The summons shall be issued by the clerk, upon a written precipe filed by the plaintiff;

shall be under the seal of the court from which the same shall issue, shall be signed by the clerk, and shall be dated the day it is issued. It shall be directed to the sheriff of the county, and command him to notify the defendant or defendants, named therein, that he or they have been sued, and must answer the petition filed by the plaintiff, giving his name, at a time stated therein, or the petition will be taken as true, and judgment rendered accordingly; and where the action is on contract for the recovery of money only, there shall be indorsed on the writ the amount, to be furnished in the precipe, for which, with interest, judgment will be taken, if the defendant fail to answer. If the defendant fail to appear, judgment shall not be rendered for a larger amount and the costs.

The copy of the summons served need not be certified as a copy. *Dresser v. Wood*, 15-357.

Precipe in replevin: "The clerk of the district court will please issue process in the above-entitled action, returnable according to law," is sufficient to require the issuing of a summons, as well as an order of delivery. *Kennedy v. Beck*, 15-555.

When the action is for money, and to subject real estate to the payment thereof, and the summons is indorsed with the amount for which judgment is claimed, corresponding with the judgment rendered, no error appears; the action not being for the "recovery of money only," no indorsement on the summons is required. *George v. Hatton*, 2-333.

A defendant who has answered a petition is not in default because an amended petition is filed making a new party plaintiff, to which no new answer is filed. The issue of a summons to the amended petition, and the service thereof, does not change the case. The defendant is already in court, and the new summons has no function to perform. *Stevens v. Thompson*, 5-305.

(3855) **§ 60. Summons to other County.** Where the action is rightly brought in any county, according to the provisions of article five, a summons shall be issued to any other county against any one or more of the defendants, at the plaintiff's request.

Where the suit is brought outside the county where the defendant resides or is summoned, the co-defendant must be a real party in interest against whom judgment might be rendered, and where the defendant in the county where suit is brought obtains a judgment in his favor, or the case is dismissed as to him, the court has not jurisdiction as to the party not served or residing in that county. *Brenner v. Egley*, 23-123.

(*Code 1859, §§ 66-70.*) Affidavit showing summons could not be served on the defendant within the territory of Kansas, sustains publication service. *Carey v. Reeves*, 32-723.

Summons or attachment cannot be issued to another county, unless the action is rightfully brought in the county from which it issued. *Rullman v. Hulse*, 32-600.

Where one of two defendants in the county in which suit is brought acknowledges service on the back of the summons, a summons for the other defendant may rightfully issue to another county. *Hendrix v. Fuller*, 7-337.

(3856) **§ 61. Summons; Service; Return.** The summons shall be served and returned by the officer to whom it is delivered, except when issued to any other county than the one in which the action is commenced, within ten days from its date; and, when issued to another county, shall be made returnable in not less than ten nor more than sixty days from the date thereof, at the option of the party having it issued.

The ordinary rule of computation of time, as prescribed by statute, is to exclude the first and include the last day. *Warner v. Bucher*, 24-479.

Order of attachment issued at same time as the summons, made returnable twenty days from its date, is not void. *Smith v. Payton*, 13-365.

Where a summons, issued to the sheriff of the county in which the action was brought, is made returnable in less than ten days, and the same is duly served one day before the return day thereof: *Held*, That neither the summons nor the service is either void or voidable. *Clough v. McDonald*, 18-115.

(3857) **§ 62. Alias Summons.** When a writ is returned "Not summoned," other writs may be issued, until the defendant or defendants shall be summoned; and when defendants reside in different counties, writs may be issued to such counties at the same time.

SERVICE OF SUMMONS—ACTUAL SERVICE.

(3858) **§ 63. Service of Summons.** The summons shall be served by the officer to whom it is directed, who shall endorse on the original writ the time and manner of service. It may be also served by any person not a party to the action, appointed by the officer to whom it is directed. The authority of such person shall be indorsed on the writ. When the writ is served by a person appointed by the officer to whom it is directed, or when the service is made out of this state, the return shall be verified by oath or affirmation.

Where a summons is issued in a suit commenced in one county, and directed to the sheriff of such county, but sent to the sheriff of another county, it cannot be served by a deputy sheriff of such other county, who has no authority to serve the same except merely such authority as he may have by virtue of being such deputy sheriff. *Branner v. Chapman*, 11-118.

There is no way under our laws by which a service of summons can be

made on a copartnership firm, except by making service on each individual member of the firm. *Dresser v. Wood*, 15-359.

Where a defendant has not been regularly served by summons, or publication of notice, the record cannot be amended after judgment, so as to bring him into court and sustain the judgment. But where a defendant has been regularly served, and there is simply a defect in the return of the officer, or the proof of publication, that defect can be cured by amendments, so as to conform to the facts. *Foreman v. Carter*, 9-674; *Kirkwood v. Reedy*, 10-453.

(3859) **§ 64. Summons; Service.** The service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence, at any time before the return day.

The copy of the summons served need not be certified. *Dresser v. Wood*, 15-357.

The service of summons on the return day is not authorized by law, and a judgment rendered on default on such a service will be reversed at the instance of the judgment debtor, if he seeks relief in proper time. *Dutton v. Hobson*, 7-196; *Simcock v. National Bank*, 14-529.

(3860) **§ 65. Summons; Return.** In all cases the return must state the time and manner of service.

Return of sheriff may be impeached, by showing that the place where process was left was not the residence of the defendant. *Bond v. Wilson*, 8-229.

Return of the sheriff, showing personal service on husband and wife, was not overcome by testimony of husband that both copies were left with him, and he did not deliver any to her, and testimony of wife, who testified that no copy of the summons was ever given to her, and she had no knowledge of the pendency of the action till the time of filing the motion. *Starkweather v. Morgan*, 15-274.

Defective return may be amended after judgment. *Kirkwood v. Reedy*, 10-453.

Every legal presumption is in favor of the truth of a sheriff's return. *Ingraham v. McGraw*, 3-521.

(3861) **§ 66. Summons; Return; Time.** The officer, to whom the summons is directed, must return the same at the time therein stated.

Where a summons is issued in a suit commenced in one county, and directed to the sheriff of such county, but sent to the sheriff of another county, it cannot be served by a deputy sheriff of such other county, who has no authority to serve the same except merely such authority as he may have by virtue of being such deputy sheriff. *Branner v. Chapman*, 11-118.

Return of sheriff may be impeached, by showing that the place where process was left was not the residence of defendant. *Bond v. Wilson*, 8-229.

(3862) **§ 67. Accepting Service.** An acknowledgment on the back of the summons, or the voluntary appearance of a defendant, is equivalent to service.

Where an attorney of one of two defendants in the county in which suit is brought acknowledges service on the back of the summons, a summons for the other defendant may rightfully issue to another county. *Hendrix v. Fuller*, 7-337.

Husband cannot, without authority from his wife, acknowledge service of a summons for her. *Moore v. Wade*, 8-380.

(3863) **§ 68. Summons on Corporation.** A summons against a corporation may be served upon the president, mayor, chairman of the board of directors, or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof.

A service of a summons on a person who keeps books for a corporation, but who is not the secretary or the clerk of the corporation, or any other officer or agent of the corporation upon whom a legal service may be made, is not a valid service upon the corporation. A service in such a case must be upon the person who holds the office of secretary or clerk of the corporation. *Chambers v. Bridge Manufactory*, 16-270.

When a summons is served on the secretary of a corporation, the return should state that the president or other chief officer was absent from the county, or could not be found. *Palmetto Town Co. v. Rucker*, McC.-147.

Summons; copy delivered "to D. W. M., agent of said U. P. Rly. Co., Manhattan, Kas." It does not show that said March was president or chairman of the board of directors, or other chief officer, cashier, treasurer, secretary, clerk or managing agent, and is not good. *U. P. Rly. Co. v. Pillsbury*, 29-653.

(3864) **§ 68a. Summons; Corporation; Agents.** Every railroad company or corporation, and every stage company doing business in the state of Kansas, or having agents doing business therein for such corporation or company, is hereby required to designate some person residing in each county, into which its railroad line or stage route may or does run, or in which its business is transacted, on whom all process and notices issued by any court of record or justices of the peace of such county may be served. [L. 1871, ch. 123, § 1; took effect March 23, 1871.]

Summons; copy delivered "to D. W. M., agent of said U. P. Rly. Co., Manhattan, Kansas." It does not show that said March was president or chairman of the board of directors, or other chief officer, cashier, treasurer, secretary, clerk or managing agent, and is not good. *U. P. Rly. Co. v. Pillsbury*, 29-653.

(3865) **§ 68b. Summons; Corporation.** In every case such railroad company or corporation, and stage company, shall file

a certificate of the appointment and designation of such person, in the office of the clerk of the district court of the county in which such person resides; and the service of any process upon the person so designated, in any civil action, shall be deemed and held to be as effectual and complete as if service of such process were made upon the president, or other chief officer of such corporation or stage company. Any railroad company, [or?] corporation, or stage company, may revoke the appointment and designation of such person upon whom process may be served, as hereinbefore provided, by appointing any other person qualified as above specified, and filing a certificate of such appointment as aforesaid; but every second or subsequent appointment shall also designate the person whose place is filled by such appointment. [L. 1871, ch. 123, § 2: took effect March 23, 1871.]

(3866) **§ 68c. Summons; Corporation.** If any railroad or stage company, or corporation, fail to designate and appoint such person, as in the preceding sections is provided and required, such process may be served on any local superintendent of repairs, freight agent, agent to sell tickets, or station keeper, of such company or corporation in such county, or such process may be served by leaving a copy thereof, certified by the officer to whom the same is directed, to be a true copy, at any depot or station of such company or corporation, in such county, with some person in charge thereof, or in the employ of such company or corporation, and such service shall be held and deemed complete and effectual. [L. 1871, ch. 123. § 3: took effect March 23, 1871.]

Summons; copy delivered "to D. W. M., agent of said U. P. R. R. Co., Manhattan, Kansas." It does not show that said March was president of chairman of the board of directors, or other chief officer, cashier, treasurer, secretary, clerk or managing agent, and is not good. U. P. R. R. v. Pillsbury, 29-653.

Ch. 123, L. 1871, applies only to process strictly so called, and does not apply to notice of attorney's lien. K. P. R. R. v. Thacher, 17-103.

Service of summons on a railway company, by the sheriff leaving a copy thereof with J. A. W., at the depot of the company, in the county, he being in charge of the depot, and ticket agent of the company, and the railway company having designated no person in said county upon whom summons should be served, is good, without specifying in express terms that the road of the company runs into that county, or that the company transacts its business therein. M. K. & T. R. R. v. Crowe, 9-496.

(3867) **§ 68d. Summons; Corporation.** In all cases where service of any process cannot be had upon the person designated by such company or corporation personally, service may be

made by leaving a certified copy of such process at the usual place of residence of such person, or as in the last preceding section, and the same shall be deemed complete and effectual. [L. 1871, ch. 123, § 4; took effect March 23, 1871.]

(3868) **§ 69. Summons; Insurance Company.** Where the defendant is an incorporated insurance company, and the action is brought in a county in which there is an agency thereof, the service may be upon the chief officer of such agency.

(3869) **§ 70. Summons; Foreign Corporation.** Where the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent.

(3870) **§ 71. Summons; Infant.** When the defendant is a minor, under the age of fourteen years, the service must be upon him and upon his guardian or father, or if neither of these can be found, then upon his mother, or the person having the care or control of the infant, or with whom he lives. If neither of these can be found, or if the minor be more than fourteen years of age, service on him alone will be sufficient. The manner of service may be the same as in the case of adults.

This applies to constructive as well as actual service. *Walkenhorst v. Lewis*, 24-427.

CONSTRUCTIVE SERVICE.

(3871) **§ 72. Publication Service.** Service may be made by publication in either of the following cases: In actions brought under the forty-sixth and forty-seventh sections of this code, where any or all of the defendants reside out of the state; in actions brought to establish or set aside a will, where any or all of the defendants reside out of the state; in actions to obtain a divorce when the defendant resides out of this state; in actions brought against a non-resident of this state, or a foreign corporation, having in this state property or debts owing to them, sought to be taken by any of the provisional remedies, or to be appropriated in any way; in actions which relate to, or the subject of which is, real or personal property in this state, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of the state, or a foreign corporation; and in all actions where the defendant, being a resident of the state, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent.

The affidavit should show by a sufficient statement of facts the existence of a cause of action in favor of the plaintiff and against the defendant, and what that cause of action is, in order that the court may see, from such a statement of facts, that the action is one of those mentioned in § 72. *Claypoole v. Houston*, 12-324.

Where a service of publication is made in a foreclosure of a mortgage, without the affidavit showing service cannot be made personally in this state being first filed, the service is void, and judgment sale and sheriff's deed are also void. *Shields v. Miller*, 9-398.

Publication under this section; action dismissed on special appearance, because summons improvidently issued, the attorneys having executed the bond for costs. *Bentz v. Eubanks*, 32-323.

An attachment is a provisional remedy. *Repine v. McPherson*, 2-345.

"J. F. C., being duly sworn, says that he is the agent of the plaintiff in this action; that defendant is a non-resident of Kansas, and that service of summons cannot be had upon him within this state, and that the above-entitled action relates to and the subject of it is real property, situated in Miami county, Kansas, in which defendant has an interest from which the plaintiff seeks to exclude him." As this affidavit was drawn in substantial compliance with sec. 72 of the code, it was sufficient foundation for service by publication; at least the service made thereon cannot be attacked collaterally. (12-282.) *Rowe v. Palmer*, 29-339.

Suit against foreign corporation, and its treasurer, found within the state, is garnished, and such treasurer has no funds of said corporation in his hands within this state; the court obtains no jurisdiction. *Wheat v. P. C. & Ft. D. M. Rld.*, 4-370.

The decree against the infants is erroneous, for other reasons than the defects in the petition above stated. They were not in court, nor could they be without personal service, if residents of the territory, or publication, if non-residents. *Armstrong v. Bridge Co.*, McC.-169.

(3872) **§ 73. Publication Affidavit.** Before service can be made by publication, an affidavit must be filed, that service of a summons cannot be made within this state, on the defendant or defendants, to be served by publication, and showing that the case is one of those mentioned in the preceding section. When such affidavit is filed, the party may proceed to make service by publication.

It will be seen from this statute, that the plaintiff is not required to state in his affidavit the evidence, the probative facts upon which a court or judge may find the ultimate facts, but he states the ultimate facts himself. *Ogden v. Walters*, 12-293.

The affidavit should show, by a sufficient statement of facts, the existence of a cause of action in favor of the plaintiff and against the defendant, and what that cause of action is. *Claypoole v. Houston*, 12-324.

Affidavit, "That said A. B. M. has removed from the state of Kansas, and now lives in the so-called 'Southern Confederacy,' as he is informed, and that

service of a summons cannot be made on the said A. B. M. within the state," was sufficient for decree of foreclosure. *Deitrich v. Lang*, 11-636.

All that such an affidavit is required to show is, that personal service cannot be made on the defendant within the state, and that the action is one in which service by publication may be had. *Gillespie v. Thomas*, 23-139.

Where a service of publication is made in a foreclosure of a mortgage, without the affidavit showing service cannot be made personally in this state being first filed, the service is void, and judgment sale and sheriff's deed are also void. *Shields v. Miller*, 9-398.

Affidavit by the plaintiff's attorney, that he filed a petition, giving its substance, and stating that it was for the sale of lands in the county, and that defendant is a non-resident, held sufficient foundation for service by publication. *McBride v. Hartwell*, 2-411.

This kind of service can only be had after the filing of an affidavit for service by publication. *Ogden v. Walters*, 12-294.

Under code 1859, §§ 52, 78, 79, affidavit for publication: "That the said defendant has removed from the said county of Shawnee, and now resides in that region of country known as Pike's Peak, and that service of summons cannot be made on said defendant within this territory." *Held*, Under the circumstances of this case, that the affidavit will be considered sufficient. 32-718.

In an action to reform and foreclose a real estate mortgage, the affidavit for publication omitted the reformation of the mortgage, yet considered sufficient when attacked collaterally. *Carey v. Reeves*, 32-718.

(3873) § 74. **Publication; Paper.** The publication must be made three consecutive weeks, in some newspaper printed in the county where the petition is filed, if there be any printed in such county; and if there be not, in some newspaper printed in this state, of general circulation in that county. It shall state the court in which the petition is filed, the names of the parties, and must notify the defendants thus to be served that he or they have been sued and must answer the petition filed by the plaintiff, on or before a time to be stated (which shall not be less than forty-one days from the date of the first publication), or the petition will be taken as true, and judgment, the nature of which shall be stated, will be rendered accordingly.

A notice of publication in a suit in which land has been attached, which notice describes the land as "the northeast quarter of section nine, township five, range eighteen," without stating whether it was E. or W. of the 6th P. M., is not sufficiently certain. *Cohen v. Trowbridge*, 6-385.

The statutory rule of computation obtains in respect to the time for publication of notice to non-resident defendants. The day of the first publication is to be excluded, and the answer day included. *Beckwith v. Douglass*, 25-229.

Computation of time as prescribed by the statute excludes the first day and includes the last. *Warner v. Bucher*, 24-479.

An order of the clerk, that defendants be notified of the pendency of the suit, giving the title and court, time of the filing of the petition and its prayer, and on what founded, and the day the defendants are required to answer, signed and sealed by the clerk, with the name of the plaintiff's attorney appended, contains all the statutory requisites of a notice for publication of summons. *McBride v. Hartwell*, 2-411.

It will be seen from this statute that the plaintiff is not required to state in his affidavit the evidence, the probative facts, upon which a court or judge may find the ultimate facts, but he states the ultimate facts himself. *Ogden v. Walters*, 12-293.

(3874) **§ 75. Publication; Proof.** Service by publication shall be deemed complete when it shall have been made in the manner and for the time prescribed in the preceding section: and such service shall be proved by the affidavit of the printer, or his foreman or principal clerk, or other person knowing the same. No judgment by default shall be entered on such service until proof thereof be made, and approved by the court, and filed.

When service by publication is made against a defendant, who is a non-resident, in the case authorized by the statute, in the manner and for the time prescribed by the statute, and such service is proved by the affidavit of the printer knowing the same, and is filed in the court, but the court does not examine or inspect the service or the proof thereof, the judgment by default rendered against the defendant upon such service is not void, nor subject to successful attack collaterally. *Williams v. Moorehead*, 33-609.

(3875) **§ 76. Personal Service out of State.** In all cases where service may be made by publication, personal service of summons may be made out of the state by the sheriff of the county in which such service may be made. Such summons shall be issued by the clerk, under seal of the court, and directed to the defendant or defendants to be served, and shall notify him or them that he or they have been sued by the plaintiff or plaintiffs, naming him or them, and requiring him or them to answer the petition filed by the plaintiff or plaintiffs in the clerk's office, of the court, which shall be named, within sixty days from the day of service, or the said petition will be taken as true, and judgment rendered accordingly. Such service may be proved by the affidavit of the person making the same, before a clerk of a court of record, or other officer holding the seal thereof, or before some commissioner appointed by the governor of this state, under an act providing for the appointment of commissioners to take depositions, etc.: *Provided*, That such service, when made and proved as aforesaid, shall have the same force and effect as service obtained

by publication, and no other or greater force or effect. [§ 76, as amended, L. 1871, ch. 113, § 1; took effect Feb. 23, 1871.]

Notice to enforce individual liability of a stockholder in an insolvent corporation, served beyond the jurisdiction of the court, and outside the state, will not confer jurisdiction upon the court, or authorize it to award an execution against the property of the stockholders that may be found within the state. *Howell v. Manglesdorf*, 33-194.

Service quashed and set aside because improper bond for costs had been taken. *Bentz v. Eubanks*, 32-322.

The statute authorizes the summons to be served out of the state by a sheriff, and names no other person, and the service cannot be made by a deputy or any other person acting as a substitute for him. *Flint v. Noyes*, 27-353.

No copy of the petition filed in a case is required to be served with the summons to make the service valid. *Case v. Bartholow*, 21-301.

(3876) **§ 77. Opening Judgment; Effect.** A party against whom a judgment or order has been rendered, without other service than by publication in a newspaper, may, at any time within three years after the date of the judgment or order, have the same opened, and be let in to defend. Before the judgment or order shall be opened, the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; but the title to any property, the subject of the judgment or order sought to be opened, which, by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall they affect the title of any property sold before judgment under an attachment. The adverse party, on the hearing of an application to open a judgment or order, as provided by this section, shall be allowed to present counter affidavits to show that during the pendency of the action the applicant had notice thereof in time to appear in court and make his defense.

Action by county to foreclose tax lien, under ch. 39, L. 1877. Ejectment suit by purchaser; afterwards original owner opened up the judgment under § 77 of the code, and modified the judgment previously rendered by merely reducing the amount thereof, but this did not disturb or impair the right of the plaintiff in ejectment to the land in dispute. (24-428.) *Pritchard v. Madren*, 31-38.

By this section three things are required: First, that the applicant give notice; second, that he file a full answer, and if required by the court, pay

all costs; and third, that he make it appear to the satisfaction of the court by affidavit that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense. *Albright v. Warrentin*, 31-443.

Judgment, under ch. 39, L. 1877, may be opened under § 77, code. *Pritchard v. Commissioners*, 26-587.

Sec. 77 of the code permits parties constructively served to be let in to defend. *Morrill v. Janes*, 26-149.

The action of the court below in disposing of the motion for confirmation, and confirming the sale before rendering a decision upon the motion to vacate the judgment, was under the circumstances of this case grossly unjust to the plaintiffs in error, against whom the judgment had been rendered. *Johnson v. Lindsay*, 27-516.

Now to constitute the "actual notice" specified in the statute, it is not necessary that the defendant be fully informed as to time of commencing suit, the court in which it is commenced, the property that has been attached, the exact amount claimed, the day named for answer, or other details of the action. It is enough that he is distinctly and clearly notified that a suit has been commenced and is pending against him, and notified from such a source and within such a time, that by the exercise of ordinary and reasonable care and prudence he can ascertain all details and make his defense. *Beckwith v. Douglass*, 25-234.

Motion in this case was not made under this section, but under § 575. *Walkenhorst v. Lewis*, 24-425.

When a plaintiff who has obtained upon service by publication a judgment in his favor, in an action in the district court to quiet his title, conveys in good faith the land to a stranger before an application is made to open the judgment under § 77, the subsequent vacation of the judgment does not divest the purchaser of his title. *Howard v. Entreken*, 24-428.

When a decree of divorce was duly and legally entered, after service by publication, and the mailing of a copy of the petition and publication notice, as required by § 641: *Held*, That the defendant could not come in under § 77, and upon the showing of want of actual notice have the decree set aside and be let in to defend. *Lewis v. Lewis*, 15-181.

And in all cases a judgment obtained on service by publication could be opened within three years upon equitable terms, under § 83, code 1862—§ 77, code 1868. *Ogden v. Walters*, 12-205.

A void judgment never starts the statute of limitations running. *Foreman v. Carter*, 9-678.

(3877) **§ 78. Publication; Unknown Heirs.** In actions where it shall be necessary to make the heirs or devisees of any deceased person defendants, and it shall appear by the affidavit of the plaintiff, annexed to his petition, that the names of such heirs or devisees, or any of them, and their residence, are unknown to the plaintiff, proceedings may be had against such unknown heirs or devisees, without naming them; and the

court shall make such order respecting service as may be deemed proper. If service by publication be ordered, the publication shall not be less than three weeks.

(3878) **§ 79. Summons; Service on Part.** Where the action is against two or more defendants, and one or more shall have been served, but not all of them, the plaintiff may proceed as follows: *First*, If the action be against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served; and if they are subject to arrest, against the persons of the defendants served. *Second*, If the action be against defendants severally liable, he may, without prejudice to his rights against those not served, proceed against the defendants served in the same manner as if they were the only defendants.

(3879) **§ 80. Res Adjudicata; Parties Defendant.** Nothing in this code shall be so construed as to make a judgment, against one or more defendants jointly or severally liable, a bar to another action against those not served.

(3880) **§ 81. Lis Pendens; Notice.** When the petition has been filed, the action is pending, so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title; but such notice shall be of no avail unless the summons be served or the first publication made within sixty days after the filing of the petition.

The doctrine of *lis pendens*, however, applies only in cases where the suit is about some specific piece of property, and then only to the extent of preventing a purchaser, *pendente lite*, from acquiring any interest in the thing in litigation, to the prejudice of the adverse party. *Marshall v. Shepard*, 23-326.

Suit against partners; service on one is a *lis pendens* as to a partnership transaction. *Dresser v. Wood*, 15-358.

(*Code 1859, § 87.*) The service of summons by publication having been completed April 6th, 1863, no person, under § 87, Comp. Laws 138, could acquire an interest in the real estate against defendant in error after that. (20-466.) *Bayer v. Cockrill*, 3-283.

(3881) **§ 82. Judgment, Recording; Lien.** When any part of real property, the subject-matter of an action, is situated in any other county or counties than the one in which the action is brought, a certified copy of the judgment in such action must be recorded in the office of the register of

deeds of such other county or counties, before it shall operate therein as notice, so as to charge third persons, as provided in the preceding section. It shall operate as such notice, without record, in the county where it is rendered.

ARTICLE 7—JOINDER OF ACTIONS.

SEC. 83. What causes of action may be joined; must affect all the parties, except, etc.

(3882) **§ 83. Joinder of Actions.** The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of either one of the following classes: *First*, The same transaction, or transactions, connected with the same subject of action. *Second*, Contracts, express or implied. *Third*, Injuries, with or without force, to person and property, or either. *Fourth*, Injuries to character. *Fifth*, Claims to recover the possession of personal property, with or without damages for the withholding thereof. *Sixth*, Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same. *Seventh*, Claims against a trustee, by virtue of a contract, or by operation of law. But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, except in actions to enforce mortgages or other liens.

Cause of action for rents and profits may be united with one in ejectment, and both may be united with one for partition. (18-399.) *Scantlin v. Allison*, 32-379.

It is true that by the provisions of § 83 of the code, a claim for damages for withholding the real estate may be united in the petition with the action to recover the real estate; nevertheless § 599 is intended to apply to actions brought under the prior § 595. Second trial not a matter of right after a default judgment. *Hall v. Sanders*, 25-549.

Causes of action in tort can only be united with causes of action on contract where they all arise out of the same transaction, or transactions, connected with the same subject of action. But even then they cannot be united, unless they all affect all the parties to the action, except in actions to enforce mortgages or other liens. *Hoye v. Raymond*, 25-667.

Causes of action for ejectment, rents and profits, and for partition, connected with the same subject of action, may be united. (18-407.) *Black v. Drake*, 28-483.

A plaintiff may join in one action as many causes of action as he may have, whether legal or equitable, or both, where they all arise out of contracts, either express or implied, and whether they are for liquidated claims or unliquidated damages, or for something else. *Stevens v. Able*, 15-587.

A petition is bad that groups under one count 670 separate causes of action. Such a petition does not, nor does any count thereof, state facts sufficiently *well pleaded* to constitute a cause of action. *Stewart v. Balderston*, 10-143.

Cause of action, injuries from overflow of dam, and injunction to restrain maintenance of the dam, may be united. *Akin v. Davis*, 11-580.

Plaintiff may join guarantor and maker as parties defendant. *Hendrix v. Fuller*, 7-331.

A cause of action for false imprisonment may be joined with a cause of action for slander, where both arise out of the same transaction. *Harris v. Avery*, 5-147.

(*Code 1859, §§ 89, 90.*) Motion to consolidate separate actions brought by the different plaintiffs to foreclose the respective liens, even if made by the defendant, should be denied. *Harsh v. Morgan*, 1-293.

ARTICLE 8—PLEADINGS IN CIVIL ACTIONS.

SEC.

- 84. Pleadings, what are.
- 85. Former rules of pleading abolished.
- 86. Pleadings allowed.

PETITION.

- 87. Must contain what.
- 88. Causes of action to be stated separately.

DEMURRER.

- 89. Defendant may demur, when.
- 90. Demurrer shall specify what.
- 91. Objections may be taken by answer, when; objection deemed waived, when.
- 92. Proceeding when causes of action misjoined.
- 93. Defendant may demur to part and answer to part.

ANSWER.

- 94. Shall contain what; may set up different defenses, counter-claims, etc.
- 95. Counter-claim, what is.
- 96. Omission of counter-claim; effect of, as to costs in subsequent action thereon.
- 97. New party may be made on counter-claim.
- 98. Set-off, what, and when may be pleaded.

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- 99. New party may be made on set-off.
- 100. Cross demands deemed compensated, when.
- 101. Guardian, attorney, etc., to file answer denying material allegations.

REPLY.

- 102. Plaintiff may reply or demur to new matter in answer.
- 103. Reply may be demurred to, when.
- 104. Co-defendant may demur or reply, when.

GENERAL RULES OF PLEADING.

- 105. Answer, demurrer and reply to be filed, when.
- 106. Time may be extended.
- 107. Pleading to be subscribed.
- 108. Certain allegations to be taken as true, unless denial be verified by affidavit.
- 109. Verification not required, when.
- 110. One of several parties may verify; when corporation is a party, who shall verify.
- 111. Verification, when sufficient.
- 112. Verification of non-resident of county.
- 113. Verification; how signed, certified and authenticated.

SEC.

- 114. Verification by agent or attorney.
- 115. Pleadings to be liberally construed.
- 116. Fictions abolished.
- 117. Title of cause not to be changed.
- 118. Copy of instrument to be filed with pleading.
- 119. Redundant or irrelevant matter may be stricken out.
- 120. Counter-claim or set-off may be made subject of separate proceeding, when.
- 121. Allegation of jurisdiction.
- 122. Of performance of conditions precedent.
- 123. Statement of written instrument for payment of money.
- 124. Pleading private statute.
- 125. What to state in action for libel or slander.
- 126. Defendant may allege truth of matter, and mitigating circumstances.
- 127. How real property described.
- 128. Material allegation not controverted to be taken as true; demurrer to reply not to admit facts alleged, except, etc.
- 129. Material allegation, what is.
- 130. Presumptions of law, etc., need not be stated.

SEC.

- 131. Tender of money.
- 132. If pleading lost, copy may be substituted.

MISTAKES IN PLEADING, AND AMENDMENTS.

- 133. Effect of variance in pleading, and how amended.
- 134. When variance not material, court may direct what.
- 135. Allegation unproved not deemed a variance.
- 136. Amendment of petition before answer.
- 137. Amendment on demurrer.
- 138. Demurrer overruled, party may reply.
- 139. Court may allow amendment of pleadings, etc., at any time.
- 140. What errors or defects immaterial.
- 141. Amendment, if demurrer sustained.
- 142. Continuance granted on amendment, when.
- 143. Defendant may be sued by any name, when.
- 144. Supplemental petition, answer or reply.
- 145. Consolidation of actions.
- 146. Order for consolidation, by whom made.

(8883) **§ 84. Pleadings Defined.** The pleadings are the written statements, by the parties, of the facts constituting their respective claims and defenses.

Whenever it is necessary to allege the non-existence of a fact, the best and only proper way to do it is to allege its non-existence in positive and direct terms. *Gilmore v. Norton*, 10-491.

Allegations in a reply are controverted without any formal denial. *Board v. Shaw*, 15-34.

In an action upon a bond, conditioned for the making of a warranty deed for certain lots, "so soon as the title should be procured from the South Leavenworth Town Association, or by the obligor," a petition failing to aver that either ever acquired any title to the lots, is demurrable. *Stone v. Young*, 4-17.

A petition which alleges that the cattle of the defendant trespassed upon the lands and crops of the plaintiff, in the county, and destroyed growing corn belonging to the plaintiff, to plaintiff's damage, will be held good as against any objection that can be raised on demurrer. *Davis v. Wilson* 11-74.

The code has not changed the substance of pleading. *Bliss v. Burnes*, McC.-91.

As to which party shall plead the several matters going to form the issue, the code has made no change from the provisions of the common law. *Backus v. Clark*, 1-303.

A suit in chancery, commenced before the enactment of the code, must be treated as a chancery suit. *Walker v. Armstrong*, 2-198.

Counter-claim pleaded under the "common counts" held sufficient, no objections to the plea having been made. *Meagher v. Morgan*, 3-372; *Clark v. Fensky*, 3-389.

(3884) **§ 85. Forms; Pleadings.** The rules of pleading heretofore existing in civil actions are abolished; and hereafter, the forms of pleadings in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this code.

The old forms of pleading are abolished in Kansas. *Bernhard v. Wyandotte*, 33-467.

(3885) **§ 86. Pleadings Allowed.** The only pleadings allowed are: *First*, The petition by the plaintiff. *Second*, The answer or demurrer by the defendant. *Third*, The demurrer or reply by the plaintiff. *Fourth*, The demurrer by the defendant, to the reply of the plaintiff. [L. 1870, ch. 87, § 3 (§ 86, as amended); took effect May 12, 1870.]

The allegations in the reply are, under our system of pleadings, to be deemed controverted by the defendants without any formal denial of the same on their part. *Board v. Shaw*, 15-41.

THE PETITION.

(3886) **§ 87. Petition.** The petition must contain:

Court; Names of Parties. *First*, The name of the court, and the county in which the action is brought, and the names of the parties, plaintiff and defendant, followed by the word "petition."

Claim. *Second*, A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition.

Prayer. *Third*, A demand of the relief to which the party supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated; and, if interest thereon be claimed, the time from which interest is to be computed shall be also stated.

The old forms of pleading are abolished in Kansas, and all that the pleader is now required to do is to state the *facts* of his case in ordinary and concise language and without repetition. *Bernhard v. Wyandotte*, 33-467.

And when the plaintiff has stated the facts of his case, he will be entitled to recover thereon just what such facts will authorize. *McGonigle v. Atchison*, 33-736.

Now it must be remembered that the defendants do not demur to the plaintiff's prayer for relief, but only to his cause of action, and that the prayer for relief and the cause of action are entirely separate and distinct things. * * * The fact that the plaintiff asked for more relief than he was entitled to, and asked for more relief in the alternative, we think does not render the petition insufficient as stating a cause of action. *Hiatt v. Parker*, 29-771.

The prayer for relief is no portion of the cause of action. *Hiatt v. Parker*, 29-771.

The time for which interest is claimed must be stated. (5-254.) *Gas Co. v. Schliefer*, 22-470.

Where a plaintiff states in his petition all the facts of his case, setting forth a special contract, the work done thereunder and its value, and then proves such facts, he may recover thereon, provided he could have recovered thereon at common law, either upon the special contract, or upon a *quantum meruit* count. *Usher v. Hiatt*, 21-548.

Petition objected to first time, by objecting to introduction of evidence, will be liberally construed. Judgment not reversed because petition on recognizance did not allege that recognizance had been filed in the district court. *Barkley v. State*, 15-100.

Petition on note sets out note in full; omission to attach a copy will not authorize a reversal. "State of Kansas, Leavenworth county district court, first judicial district," sets out name of court fully. *Budd v. Kramer*, 14-101.

An objection that a petition does not state facts sufficient to constitute a cause of action, is not waived by a failure to answer or demur, and can be raised by simply objecting to any judgment thereon. *Fox v. Van Norman*, 11-214.

A petition is bad that groups under one count 670 causes of action, and refers in each count to the facts stated in the heading. *Stewart v. Balderson*, 10-148.

Facts in issue, is meant by facts, same as in § 285. *Nat'l Bank v. Peck*, 8-666.

He may always recover for just such injuries as he states in his petition, (provided he proves them,) and for no more. *Fitzpatrick v. Gebhart*, 7-43.

After answer filed, an objection to a petition that it does not state facts sufficient to constitute a cause of action, is good only when there is a total failure to allege some matter essential to the relief sought, and is not good when the allegations are simply incomplete, indefinite, or statements of conclusions of law. *Laithe v. McDonald*, 7-254.

Objection to petition, made in supreme court for first time, will not be entertained. *Hale & McClure v. Johnson*, 6-137.

After trial without objection, it is too late to raise the question in the supreme court for the first time, that the petition shows the cause of action was barred. *Greer v. Adams*, 6-203.

Petition for false imprisonment held good in this case. *Mayberry v. Kelley*, 1-116.

Supreme court will not consider sufficiency of petition, questioned in that court for first time. *McBride v. Hartwell*, 2-411.

Petition showing cause of action not barred; demurrer to answer, reaching back to petition, and sustained, error. *Elliott v. Lochrane*, 1-137.

Failing to claim interest, the court cannot render judgment for interest. *Green v. Dunn*, 5-262.

What is alleged in petition, and not denied in answer, must be taken as true. *Hume v. Watt*, 5-34.

Petition that states with circumstantial particularity that the defendant, an incorporated city of the second class, negligently left one of its streets out of repair, by reason whereof the plaintiff without fault on his part was injured, states facts sufficient to constitute a cause of action. *Topeka v. Tuttle*, 5-311.

Petition under § 595 held to be sufficient. *Pennock v. Monroe*, 5-586.

Suit on a note dated April 20, 1860, payable when paid by government for losses sustained in August, 1856. Payment on this note was pleaded as having been made on the 10th of November, —. The court cannot supply the year by inference or interpolation. *Jones v. Eisler*, 3-134.

Under the code, pleading the common counts for goods sold and delivered, work and labor done, money had and received, etc., constitutes a sufficient setting forth a cause of action, where no motion is made to make the same more definite and certain. *Meagher v. Morgan*, 3-372; *Clark v. Fensky*, 3-389.

(*Code 1859, § 94.*) These being necessary allegations, are to be taken as true, unless there are allegations of value or of amount of damage. *Butcher v. Bank*, 2-82.

A general averment of an agreement to insure, authorizes the proof of an insurance against fire. *W. Mass. Ins. Co. v. Duffy*, 2-347.

Petition on county treasurer's bond, setting it forth, its execution, delivery and approval, performance of duties, collection of money for county by him, settlement with county board, the account in full, showing a balance due, with all acts of the board thereon, a demand of payment, and refusal to pay or to deliver the books and money to his successor, under general objection that it does not state sufficient facts, held sufficient. *Fuller v. Jackson Co.*, 2-446.

A petition to recover for work, otherwise stating facts sufficient to constitute a cause of action, but omitting an allegation of the time when the work was done, held to be sufficient on demurrer. *Backus v. Clark*, 1-303.

Petition defective, failing to allege performance of condition precedent. *Armstrong v. Wyandotte B. Co.*, McC.-167.

(*Code 1859, § 85.*) An order drawn in blank and accepted, cannot be treated as promissory note unless the pleader alleges liability. *Bliss v. Burnes*, McC.-91.

(3887) **§ 88. Numbering Causes of Action.** Where the petition contains more than one cause of action, each shall be separately stated and numbered.

Suit on notes and mortgage. First count set forth the substance of one of said notes, which was then due, and stated a good cause of action. The sec-

and count set forth the substance of the other note, but did not state any cause of action, for the reason only that this note was not yet due. The third count set forth the substance of said mortgage, but probably did not state facts sufficient to constitute any cause of action thereon. * * * Only one cause of action was stated in the petition. * * * While the facts stated in the first count constituted a cause of action, the facts stated in the other two counts (so-called) simply modified and enlarged that cause of action, and as all the facts stated in the whole petition constituted but one cause of action, they should all have been stated in one count. *Andrews v. Alcorn*, 13-358. (But see below.)

Ib.—Referred to and followed. *Curtis v. Buckley*, 14-449.

The court, in 13-351, decided that a promissory note and mortgage executed to secure the same, taken together, constitute only one cause of action; and also decided that even two promissory notes, together with a mortgage securing them, where only one of the notes is due, do not constitute more than one cause of action. But the court has never decided that two or more promissory notes, where all are due, do not constitute more than one cause of action; and it makes no difference whether the notes are secured by a mortgage or not. *Ambrose v. Parrott*, 28-698.

Where two or more causes of action are stated in the same petition, and not separately stated or numbered, it is error for the court to overrule a motion of the defendant to require the plaintiff to separately state and number the several causes of action stated in his petition. *Pierce v. Bicknell*, 11-287.

A petition is bad that groups under one count 670 separate causes of action. *Stewart v. Balderston*, 10-143.

Each separate and distinct illegal conversion of the public funds furnished a distinct and separate cause of action; each should be separately stated and numbered, and it is the duty of the court to enforce the law. *Commissioners v. Hoaglan*, 5-562.

DEMURRER.

(3888) § 89. **Demurrer by Defendant.** The defendant may demur to the petition only when it appears on its face, either: *First*, That the court has no jurisdiction of the person of the defendant, or the subject of the action. *Second*, That the plaintiff has no legal capacity to sue. *Third*, That there is another action pending between the same parties for the same cause. *Fourth*, That there is a defect of parties, plaintiff or defendant. *Fifth*, That several causes of action are improperly joined. *Sixth*, That the petition does not state facts sufficient to constitute a cause of action.

As against a petition which does not state a cause of action, the defendant has two remedies: he may demur, (code, § 89,) or he may answer and object to the introduction of evidence under it, on the trial. (Code, § 91.) *Brown v. Mining Co.*, 32-530.

Failure to demur for defect of parties in the court below, waives that question. *Bell v. Wright*, 31-244.

(*Subd. 5.*) When misjoinder of causes of action is apparent on the face of the petition, if no objection be taken by demurrer thereto, the defendant waives the same. *Woodman v. Davis*, 32-346.

Now it must be remembered that the defendants do not demur to the plaintiff's prayer for relief, but only to his cause of action, and that the prayer for relief and the cause of action are entirely separate and distinct things. * * * The fact that the plaintiff asked for more relief than he was entitled to, and asked for more relief in the alternative, we think does not render the petition insufficient as stating a cause of action. *Hiatt v. Parker*, 29-771.

It is true that in this case the award has not culminated in a judgment of the court, but nevertheless it is a proceeding, an action pending in the court; and it is a good defense to one action that there is another action pending for the same matter between the same parties. *Weir v. West*, 27-656.

While at common law the misjoinder of any other party or parties, whose legal right only had been affected, would have been good cause for demurrer, it is not one of the enumerated causes for demurrer under the code, but perhaps a misjoinder of plaintiffs would, under the code, be within the six enumerated causes for demurrer. *Bowman v. Germy*, 23-309.

An action pending between A. and B. does not abate one pending between A. and C., and that notwithstanding each action may be upon the same instrument and for the same cause. *Mullen v. Mullock*, 22-601.

Defect of parties plaintiff is not ground of demurrer. *Winfield v. Maris*, 11-147.

Whether misjoinder of parties is ground of demurrer is not decided. *Gilmore v. Norton*, 10-502.

Petition stating 670 separate and distinct causes of action in one allegation, under one head, demurrer to same should be sustained. *Stewart v. Balderston*, 10-131.

The petition was for recovery of land, for rents and profits, and for timber cut and carried off from it. If there is a misjoinder of causes of action, it has been waived. *Simpson v. Greeley*, 8-601.

Pleas to the jurisdiction are dilatory pleas, and were not favored by the common-law practice, and much less by the spirit of our code. If not taken advantage of by answer, where the want of jurisdiction does not appear on the face of the petition, it is waived by the defendant. *Bliss v. Burnes*, McC.-94.

(3889) **§ 90. Demurrer; Contents.** The demurrer shall specify distinctly the grounds of objection to the petition. Unless it do so, it shall be regarded as objecting only that the petition does not state facts sufficient to constitute a cause of action.

(3980) **§ 91. Waiver by Defendant.** When any of the defects enumerated in section eighty-nine do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken, either by demurrer or answer,

the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action.

As against a petition that does not state a cause of action, the defendant has two remedies: he may demur, (code, § 89,) or he may answer, and object to the introduction of evidence under it on the trial. (Code, § 91.) *Brown v. Mining Co.*, 32-530.

Where there is a misjoinder of causes of action apparent on the face of the petition, and no objection is taken thereto by demurrer, the defendant waives the same. *Woodman v. Davis*, 32-346.

Failure to demur for defect of parties waives that question. *Bell v. Wright*, 31-244.

Whether objection to jurisdiction can be made by answer, not decided in this case. *Carpenter v. Carpenter*, 30-716.

If this action had been commenced in the district court, and the defect of parties had not been taken advantage of by demurrer or answer, it would have been waived. (10-420.) And we think it is further true, that when the action is commenced before a justice of the peace, although no bill of particulars is filed on behalf of the defendant, and every defense is therefore open to him (9-107), yet that unless the attention of the court is specifically called to the matter of the defect of parties, the question is waived. *Seip v. Tilghman*, 23-291.

Demurrer for misjoinder is not a demurrer for defect of parties, and failure to raise the latter question is a waiver. *Gilmore v. Norton*, 10-503.

If there was a defect of parties plaintiff, as no objection was taken thereto, either by demurrer or answer, it must be deemed that the defendant below waived the same. *K. P. R. v. Nichols*, 9-248; *Parker v. Wiggins*, 10-420.

Failure to demur for misjoinder of causes of action waives the defect. *Simpson v. Greeley*, 8-601.

Motion to dismiss the action because the plaintiff was not the real party in interest, properly overruled; failure to take advantage by answer or demurrer is a waiver. *Larkin v. Taylor*, 5-442.

Defendant in default who has neither answered or demurred, has not thereby waived his right to appear at the trial and object to the sufficiency of a petition which shows that the claim is barred. *Zane v. Zane*, 5-139.

If a portion of the plaintiff's causes of action were founded upon tort, and a portion of them founded upon contract, still as the defendant raised no objection, it must be deemed that he waived the same. *Burton v. Robinson*, 5-293.

(Code 1859, § 98.) That the lack of material facts in the petition to constitute a cause of action is not waived by failing to demur for that cause of action, is fairly inferable from the language of that section, but it furnishes no authority for holding that a defense appearing by the petition will not be waived by answer and other proceedings of the defendant placed upon the record wholly inconsistent with such defense. *Auld v. Butcher*, 2-159.

(3891) **§ 92. Misjoinder; New Petition.** When a demurrer is sustained, on the ground of misjoinder of several causes of action, the court, on motion of the plaintiff, shall allow him, with or without costs, in its discretion, to file several petitions, each including such of said causes of action as might have been joined; and an action shall be docketed for each of said petitions, and the same shall be proceeded in without further service.

A. entered into a written contract to do certain work. A., B. and C. entered into an undertaking conditioned for the faithful performance by A. of such contract. A. defaulted in the contract. A petition was filed alleging in separate counts the making of the contract, and different breaches thereof, and showing damages exceeding the amount of the undertaking. It also alleged, in another count, which referred to and made all the other counts part of it, the execution of the undertaking, and closed with a prayer for judgment for the amount of the undertaking. A demurrer was filed by B. and C. on account of improper joinder of causes of action, which was overruled. *Held*, No error, or at least none of which B. and C. could avail themselves in this court. *Houston v. Delahay*, 14-125.

When demurrer is sustained to petition for misjoinder of causes of action, the court may allow plaintiff to file several petitions, each including such as might have been joined. *Woodman v. Davis*, 32-346.

Under this section, the court, upon application of the plaintiffs, must allow them to file separate petitions for the different causes of action. *Jeffers v. Forbes*, 28-180.

(3892) **§ 93. Demurrer to Part.** The defendant may demur to one or more of the several causes of action stated in the petition, and answer to the residue.

ANSWER.

(3893) **§ 94. Answer.** The answer shall contain: *First*, A general or specific denial of each material allegation of the petition controverted by the defendant. *Second*, A statement of any new matter constituting a defense, counterclaim or set-off, or a right to relief concerning the subject of the action, in ordinary and concise language, and without repetition. *Third*, When relief is sought, the nature of the relief to which the defendant supposes himself entitled. The defendant may set forth, in his answer, as many grounds of defense, counter-claim, set-off, and for relief, as he may have, whether they be such as have been heretofore denominated legal, or equitable, or both. Each must be separately stated and numbered, and they must refer, in an intelligible manner, to the causes of action which they are intended to answer.

All that the pleader is now required to do is to state the *facts* of his case

in ordinary and concise language, and without repetition. *Bernhard v. Wyandotte*, 33-467.

Slander; answer may deny using the language, and also allege that the language is true. *Cole v. Woodson*, 32-276.

Answer setting up claim on judgment, filed before lapse of five years from date of execution on same; judgment not dormant. *State v. Ins. Co.*, 32-654.

(*Subd. 3.*) Defendant in mandamus can show he has performed the acts commanded, and also that he was not bound to perform them. *Evans v. Thomas*, 32-473.

The judgment might also, without any final revivor, be used as the foundation of an action against the representatives or the successor of the deceased. (23-181; 26-558.) And if it could be used as a cause of action when the owner of the same is plaintiff, it might also be used in any proper case as a cause of action, by setting it forth in the answer, when the owner thereof is the defendant. *Converse v. Safford*, 29-17.

In an action on a constable's bond by L., for failing to properly serve an execution in the case of L. v. F., held, that fees owing to the constable by L. in the original case are a proper set-off. *Sponenbarger v. Lemert*, 23-55.

Any cause of action arising from contract, whether it be for a liquidated demand or for unliquidated damages, may constitute a set-off, whether such action be for a liquidated demand or for unliquidated damages. *Stevens v. Able*, 15-586.

Answer of guardian *ad litem* for a minor defendant should at least deny all the material allegations of the petition prejudicial to such defendant. *Brenner v. Bigelow*, 8-497.

If either T. or C. had commenced an action against the other on his judgment, the other could have set up his judgment as a set-off. *Turner v. Crawford*, 14-503.

Usury, extension of time to principal whereby the surety is discharged, and payment, are not inconsistent defenses in an answer of a surety on a promissory note. *Shed v. Augustine*, 14-282.

Where one count of the petition alleges indebtedness generally of the defendant, without showing how created, under a general denial the defendant is entitled to prove payment of that cause of action under such answer. *Parker v. Hays*, 7-412.

Whatever is admitted in a special defense operates, so far, as a modification of a "general denial," and is to be taken as true, without other proof. *Wiley v. Keokuk*, 6-94.

Sureties on a note may plead and prove they are sureties only, and that they are released by indulgence by creditor to principal debtor on a valid contract. *Rose v. Williams*, 5-483.

A general denial is equivalent to the plea of the general issue at common law, and traverses every material allegation of the petition, and puts the plaintiff upon the proof of his cause of action. *Perkins v. Ermel*, 2-325.

Suit on county treasurer's bond, and settlement. Answer, general denial, and denies the indebtedness; and where the record of the settlement with the board, as spread upon their books, containing the items of account, was

introduced in evidence on the part of plaintiff below, *held*, that under the pleadings the only issue the record could be introduced to maintain was to show a settlement. *Fuller v. Jackson County*, 2-446.

The defects of the petition are cured by answer when it, in substance, alleges all the facts which the petition lacks. *Irwin v. Paulett*, 1-418.

That several defenses set forth in an answer are inconsistent, cannot be taken advantage of by demurrer. The proper course is to compel the party to elect on which of the inconsistent grounds he will rely. *Munn v. Taulman*, 1-254.

An answer stating "that the said plaintiff, in February or March, 1857, was indebted to said defendant on account, in the sum of \$1,054; the said account is annexed to the answer and forms part thereof," is not a sufficient pleading of a set-off, and under it no set-off whatever can be proven. The plaintiff need not reply to such allegation of new matter. *Mallory v. Leiby*, 1-97.

Allegations in the petition of the existence of a promissory note, and that it is held by plaintiff, not controverted by the answer, are taken as true. In such a case, the plaintiff is not bound to produce the note, either as part of his own case, or, when called upon at the trial, as part of the defendant's, or for his inspection. *Diven v. Spicer*, 1-103.

(3894) **§ 95. Counter-Claim.** The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action. The right to relief concerning the subject of the action, mentioned in the same section, must be a right to relief necessarily or properly involved in the action for a complete determination thereof, or settlement of the question involved therein.

The defendant in an attachment suit, after dissolution, and without mentioning the attachment bond in his pleading, cannot have any damage sustained by him on account of said attachment set off against the plaintiff's claim. *Carver v. Shelly*, 17-475.

When two persons have judgments against each other, either may maintain an action against the other to have the two judgments compensate and pay each other up to the amount of the smaller judgment. *Turner v. Crawford*, 14-499.

Suit on purchase-money notes, given for warranty deed, where the grantors only owned four-fifths of the land warranted; the defendant may set up failure of title to the fifth as a counter-claim. *Scantlin v. Allison*, 12-85.

An answer, stating "that the said plaintiff, in February or March, 1857, was indebted to said defendant on account, in the sum of \$1,050; the said account is annexed to the answer, and forms part thereof," is not a sufficient pleading of a set-off. *Mallory v. Leiby*, 1-97.

Allegations in an answer that the said firm (plaintiffs) was indebted to said defendant on account, for publishing notices in the *Bulletin* newspaper,

(a copy of which account is set forth in the answer,) amounting to \$114, that there are no credits on said account, and asking that it be allowed as an off-set, is a good pleading of a set-off. *Anthony v. Stinson*, 4-211.

(3895) **§ 96. Set-off; Counter-Claim; Costs.** If the defendant omit to set up a counter-claim or set-off, he cannot recover costs against the plaintiff in any subsequent action thereon; but this section shall not apply to causes of action which are stricken out of or withdrawn from the answer, as in sections ninety-seven and one hundred and twenty.

(3896) **§ 97. Party; Counter-Claim.** When it appears that a new party is necessary to a final decision upon a counter-claim, the court may either permit the new party to be made by a summons, to reply to the counter-claim, or may direct the counter-claim to be stricken out of the answer, and made the subject of a separate action.

(3897) **§ 98. Set-off; Pleading.** A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract or ascertained by the decision of a court.

In an action by L. against a constable, on bond, for failing to properly serve an execution, *held*, that cause of action of \$20, for constable fees which accrued in the original action, is a proper subject of set-off. *Sponenbarger v. Lemert*, 23-55.

There can be no question as to the applicability to this case of these provisions of the code, although the action was commenced in a justice's court. *Stevens v. Able*, 15-586.

Where two persons have judgments against each other, either may maintain an action against the other to have the two judgments compensate and pay each other up to the amount of the smaller judgment. *Turner v. Crawford*, 14-499.

A claim by the defendant in an attachment case, after dissolution of the attachment, for damages, without mentioning the bond, is neither a counter-claim nor set-off. *Carver v. Shelly*, 17-475.

(3898) **§ 99. Set-off; New Party.** When it appears that a new party is necessary to a final decision upon the set-off, the court shall permit the new party to be made, if it also appear that, owing to the insolvency or non-residence of the plaintiff, or other cause, the defendant will be in danger of losing his claim, unless permitted to use it as a set-off.

(3899) **§ 100. Set-off; Cross Demands.** When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counter-claim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other;

but the two demands must be deemed compensated so far as they equal each other.

In action on a constable's bond, for failing to properly serve an execution in the case of *L. v. F.*, held that the fees owing to the constable by *L.* in the original case is a proper set-off. *Sponenbarger v. Lemert*, 23-55.

An action may be maintained in this state on a domestic judgment. (9-658.) If either *T.* or *C.* had commenced an action against the other on his judgment, the other could have set up his judgment as a set-off. *Turner v. Crawford*, 14-503.

If action is brought by an assignee of a demand, the defendant, under § 108 of the code, is not deprived of his right to off-set or counter-claim against the assignor, though he may not be entitled to judgment against the assignee for any balance; but that section does not apply after judgment. *Leavonson v. Lafontane*, 3-523.

J (3900) **§ 101. Infant, etc.; Answer.** The guardian of an infant or person of unsound mind, or attorney for a person in prison, shall deny, in the answer, all the material allegations of the petition prejudicial to such defendant.

The defendants answered suit, under § 594, separately, though the answers were in substance the same. Each answer contained a general denial. Such an answer, indeed, is required to be filed, under § 101 of the civil code, by any guardian *ad litem* for an infant defendant. *Pierce v. Thompson*, 26-715.

The guardian *ad litem* should have at least denied in the answer all the material allegations of the petition prejudicial to the defendants. *Brenner v. Bigelow*, 8-500.

REPLY.

(3901) **§ 102. Reply or Demur to Answer.** When the answer contains new matter, the plaintiff may reply to such new matter, denying, generally or specifically, each allegation controverted by him; and he may allege, in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition, constituting a defense to such new matter in the answer; or he may demur to the same for insufficiency, stating, in his demurrer, the grounds thereof; and he may demur to one or more of such defenses set up in the answer, and reply to the residue.

Allegations in a reply are to be deemed controverted by the defendant, without any formal denial. *Board v. Shaw*, 15-34.

Suit for goods sold and delivered; defense, note given for them, and that same is not due, demands a reply. *Ballinger v. Lantier*, 15-608.

Suit by two to set aside assignment for creditors as fraudulent; answer, that one of the plaintiffs instructed the assignee to sell the property; objection to evidence by defendant; defendant did not waive a reply by proceeding to trial without one. *Higby v. Ayres*, 14-332.

Allegations in an answer that raise only the question of the truth of the allegations set forth in the petition, do not require a reply. *Ferguson v. Tutt*, 8-370.

Trial had as though answer was controverted, and no question made; the supreme court will not entertain the question, raised for the first time in that court, that no reply has been filed. *Wilson v. Fuller*, 9-177.

A reply which denies every material allegation of the answer is sufficient *Miller v. Brumbaugh*, 7-343.

Demurrer should be sustained to petition, if it groups in one count some 670 separate causes of action. *Parker v. Wiggins*, 10-425.

(*Sec. 111, Code 1859.*) A plaintiff may defend against the new matter set up by the defendant, by alleging new matter on his part not inconsistent with his original claim. *Wooster v. McKinley*, 1-317.

(3902) **§ 103. Demurrer to Reply.** If the reply to any defense set up by the answer be insufficient, the defendant may demur thereto, stating the grounds of such demurrer.

Reply denying each and every allegation of the answer, *setting up a counter-claim*, is good, although it should be set-off instead of counter-claim. *Anthony v. Stinson*, 4-219.

(3903) **§ 104. Co-defendant—Demurrer or Reply by.** Where the answer contains new matter constituting a right to relief against a co-defendant concerning the subject of the action, such co-defendant may demur or reply to such matter in the same manner as if he were plaintiff, and subject to the same rules, as far as applicable.

Discretionary with the court to permit reply of one defendant to be filed to answer of co-defendant after time has expired. *Douglas v. Rhinehart*, 5-393.

GENERAL RULES OF PLEADING.

(3904) **§ 105. Time of Filing Pleadings.** The answer or demurrer, by the defendant, shall be filed within twenty days after the day on which the summons is returnable; the reply or demurrer shall be filed within thirty days after the day on which the summons was made returnable; the demurrer to the reply shall be filed within forty days after the day on which the summons was made returnable.

Summons made returnable in less than ten days, and served one day before the return day; the defendant has full twenty days after the return day of the summons within which to answer or demur, and that is all that the law gives him in any case. *Clough v. McDonald*, 18-115.

An answer filed two days after time is improperly filed, and should, on motion, be stricken from the files. *Jeffs v. Flickenger*, 14-308.

Discretionary with the court to permit reply of one defendant to be filed to answer of co-defendant after time has expired. *Douglas v. Rhinehart*, 5-393.

(Code 1859, § 113.) A reply filed after time prescribed by law is improperly filed; but if the defendant does not move to strike it from the files, or if the plaintiff asks leave of the court, and files his reply, the defendant objecting, but not excepting to the ruling of the court, the defendant waives his right to object. *Osgood v. Haverty*, McC.-182.

(3905) § 106. **Time Given to Plead.** The court, or any judge thereof in vacation, may, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this act, or by an order enlarge such time.

Original application, under § 77, to open a judgment and defend having been made in time, and such as unquestionably to challenge the consideration of the court, it had, under §§ 106 and 139, the right to permit amendments of the application. *Albright v. Warkentin*, 31-445.

As will be seen from § 106 of the code, the whole matter rests within the discretion of the trial court. *Tefft v. Firey*, 22-761.

That the court, exercising a sound judicial discretion, had a right to allow said reply to be filed after jury sworn, and to proceed immediately with the trial, we suppose will not be denied. (13-518.) *Grant v. Pendery*, 15-242.

The setting aside of an entry of a default, and an order that the cause stand in its order on the trial docket for an assessment of damages, and the permitting of the defaulting party to answer upon terms, is allowable. *Spratley v. Ins. Co.*, 5-155.

(3906) § 107. **Pleadings; Signing.** Every pleading, in a court of record, must be subscribed by the party or his attorney.

(3907) § 108. **Verification Required.** In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney. [L. 1886, ch. 61, § 1 (§ 108, as amended); took effect Feb. 13, 1886.]

The defendant answered by filing a general denial, but as this answer was not verified by affidavit, all the allegations of the petition concerning the execution of the chattel mortgage must be taken as true. *McVay v. English*, 30-370.

Corporation should make the affidavit of verification of pleading by some one of its members or officers. *Baker v. Knickerbocker*, 25-291.

The petition clearly alleged the execution of the written instrument sued on, and also set forth the reason why a copy was not attached and filed with the pleading. The answer of the adults was not verified, and therefore the allegation of the execution of the obligation sued on must be taken as having been admitted. Every pleading controverting the execution of a written instrument must be verified by affidavit; otherwise, the allegation shall be taken as true. *Mays v. Foster*, 26-521.

Attorney may verify pleadings. *Baker v. Knickerbocker*, 25-290.

Only certain allegations are admitted by a failure to answer under oath. Among them are "allegations of the execution of written instruments and indorsements thereon." *Pattie v. Wilson*, 25-329.

A failure to deny under oath the execution of a written instrument set up as a demand in the probate court, does not dispense with the proof of its execution, and if the district court takes the case, and proceeds with it anew upon the appeal, the like practice ought to prevail there. In justice, § 108 ought not to extend to the representatives of a deceased party in proceedings to establish demands upon written instruments in probate court, and if new pleadings are not filed in the district court, the same rule should follow. *Neil v. Case*, 25-515.

No allegation of the petition concerning said indorsements on said promissory note was put in issue by any denial verified by affidavit, and hence all said allegations and said indorsements "must be taken as true." *Pears v. Wilson*, 23-346.

Neither of these answers was verified by affidavit, and therefore the allegations of the petition setting forth the execution of said note and mortgage and the existence of said association and corporation were not put in issue. *Massey v. Building Association*, 22-629.

The answer was not verified by affidavit, and of course did not put in issue the allegations of the petition that the plaintiffs were appointed and had authority to act as administrator and administratrix. *Reed v. Sexton*, 20-198.

Allegations of organization of school district, and of execution of official bond of treasurer, admitted unless denied under oath. *Wands v. School District*, 19-204.

"Corporation" means municipal corporations, such as cities, towns and villages, as well as private corporations. *Hixon v. George*, 18-259.

In an action on any kind of promissory note, by a person who is not the payee thereof, where the petition says nothing about any indorsement thereof, but there is an allegation in the petition stating that the note was duly transferred to the plaintiff, and that he is now the owner and holder thereof, such allegation may be put in issue by a pleading not verified. *Washington v. Hobart*, 17-277.

A suit by an assignee for rent, claiming the assignment was in writing, and setting out a copy of the same with the petition; the same must be denied under oath, or the allegation of the execution of the same shall be taken as true. *School District v. Carter*, 11-445.

Action on railroad bill of lading, answer not verified, does not put in issue the execution of the writing. *Gulf Rld. v. Wilson*, 10-112.

Incorporation of town put in issue by sworn answer. *Town v. McConnell*, 8-276.

Evidence of sheriff's bond on which suit is founded is unnecessary unless the answer is verified, but it did not prejudice defendant. *Ferguson v. Tutt*, 8-276.

(3908) § 109. **Verification not Required.** The verifica-

tion mentioned in the last section shall not be required to the answer of a guardian defending for an infant or person of unsound mind, or a person imprisoned.

(3909) **§ 110. Who May Verify; Corporation.** If there be several persons united in interest and pleading together, the affidavit may be made by any one of such parties. When a municipal or other corporation is a party, the verification may be made by an officer thereof, its agent or attorney.

(3910) **§ 111. When Sufficient.** The affidavit shall be sufficient if it state that the affiant believes the facts stated in the pleading to be true.

The affiant may verify his pleading on belief merely, when he denies the execution of a written instrument. *School Dist. v. Carter*, 11-447.

(3911) **§ 112. Verification for Non-Resident.** In all cases where the party pleading is a non-resident of the county in which the action is brought, or if he shall be absent from the county where the pleading is filed, an affidavit, made before filing the pleading, stating the substance of the facts afterward inserted in the pleading, shall be a sufficient verification. Such affidavit shall be filed with the pleading intended to be verified thereby.

Where the action is founded on a written instrument, and the petition sets forth the same in full, an answer not verified does not put in issue the execution of such written instrument, and there is no necessity for proving it.

An affidavit made four months after the answer is filed, found among the papers of the case not marked "Filed," with nothing to show that it was intended or understood to be a verification of the answer, or that the court permitted such verification, cannot be considered as a verification. *Gulf Rld. v. Wilson*, 10-105.

(3912) **§ 113. Verification; How Made, etc.** The affidavit verifying pleadings may be made before any person before whom a deposition might be taken, and must be signed by the party making the same; and the officer before whom the same was taken shall certify that it was sworn to or affirmed before him, and signed in his presence. The certificate of such officer, signed officially by him, shall be evidence that the affidavit was duly made, that the name of the officer was written by himself, and that he was such officer.

Affidavit made by plaintiff before his attorney is not good. *Warner v. Warner*, 11-123.

(3913) **§ 114. Verification by Agent or Attorney.** When the affidavit is made by the agent or attorney, it must set forth the reason why it is not made by the party himself. It can be made by the agent or attorney only: *First*, When the facts are

within the personal knowledge of the agent or attorney. *Second*, When the plaintiff is an infant, or of unsound mind, or imprisoned. *Third*, When the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney. *Fourth*, When the party is not a resident of, or is absent from, the county.

Petition for an injunction. The pleading was not of the character to necessarily require verification, and the affidavit annexed to the petition made the petition sufficient to be received and considered on the hearing for the interlocutory order. * * In this case the affiant deposed that he was the agent of the plaintiff; that the plaintiff was a non-resident of the state; that he had heard the petition read, and that the several matters therein stated were true. *Long v. Kasebeer*, 28-238.

(3914) § 115. **Pleadings Liberally Construed.** In the construction of any pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties.

On a demurrer to a pleading, everything stated therein should be taken as true, whether well pleaded or not, where no motion is made to make definite or certain, or have causes of action numbered, or have the pleading corrected. *Stewart v. Balderston*, 10-148.

If the petition contains the averments necessary to inform the defendant of the claim against him and the relief demanded, although stated in an awkward and unskillful manner, it must be held to be good on demurrer. *Crowther v. Elliott*, 7-235.

Demurrer in this case properly overruled. *Sattig v. Small*, 1-177.

A motion to strike out a reply as not responsive to the answer, for the reason that the answer sets forth a set-off to the plaintiff's claim, while the reply denies "each and every allegation of said answer, setting up a counter-claim," is too technical and must be disregarded. The further allegation in such reply, denying "each and every allegation, setting up and alleging new matter," is sufficient. *Anthony v. Stinson*, 4-212.

If a petition states a cause of action at all, the petition must be held good when demurred to on the ground that it does not state facts sufficient to constitute a cause of action, however general its statement of the facts may be. *Park v. Tinkham*, 9-619; *Ins. Co. v. Duffy*, 2-347.

A petition alleging that a writ "was issued out of and under the seal of the court," held sufficient on demurrer, although, by the copy of the writ set forth in the petition, it appears to have no seal. The fact that the writ had no seal must be taken advantage of by answer. *McCracken v. Todd*, 1-148.

(3915) § 116. **Fictions Abolished.** All fictions in pleadings are abolished.

(3916) § 117. **Title of Cause.** The title of a cause shall not be changed in any of its stages.

(3917) **§ 118. Copy ; Written Instrument Attached.** If the action, counter-claim or set-off be founded on account, or on a note, bill or other written instrument, as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading. If not so attached and filed, the reason thereof must be stated in the pleading. But if the action, counter-claim or set-off be founded upon a series of written instruments executed by the same person, it shall be sufficient to attach and file a copy of one only, and in succeeding causes of action or defenses, to set forth in general terms descriptions of the several instruments respectively. [§ 118 as amended, L. 1883, ch. 123, § 1; took effect April 5, 1883.]

The petition in this case, on sidewalk bonds, contains all the usual and necessary allegations under the statute. *Wyandotte v. Zeitz*, 21-658.

(*Gen. Stat. 118.*) When a petition on a promissory note sets out the note in full, and makes it a part hereof, an omission to attach a copy is not such an error as will authorize a reversal of the judgment. *Budd v. Kramer*, 14-101.

Original attached instead of copy, no ground of complaint. *Reed v. Arnold*, 10-103.

Failure to attach copies of notes sued on to the petition, must be objected to in the district court. *Andrews v. Alcorn*, 13-351.

(3918) **§ 119. Redundant or Irrelevant Matter ; Amendment.** If redundant or irrelevant matter be inserted in any pleading, it may be stricken out, on motion of the party prejudiced thereby; and when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

When demurrer to redundant and irrelevant matter that should have been struck out is sustained, this court will regard the same as an order striking out. *Seaton v. Chamberlain*, 32-244.

If the allegations in the petition were in any manner indefinite or uncertain, as alleged by counsel, application should have been made to compel the plaintiff below to make the petition definite and certain by amendment. 2-347; 3-372; 8-197; 18-169. *H. & St. J. R. R. vs. Fox*, 31-599.

Where the petition is so indefinite and uncertain that the precise nature of the charge is not apparent, it is error for the court to overrule a motion of a defendant to require the pleading to be amended, if the defendant is likely to be embarrassed in his defense by reason of the character of such allegations. *Water Power Co. v. McMurray*, 24-62.

Irrelevant and redundant matter, if struck out of a pleading, must be, at the instance of the party who might be prejudiced thereby, and on motion made at the first opportunity, or he will be deemed to have waived the right; and it is too late, after reply filed, to move to strike from the answer. *Savage v. Challiss*, 4-319.

(Code 1859, § 128.) Pleading the common counts for goods sold and delivered, work and labor done, money had and received, etc., constitutes a sufficient setting forth of a cause of action; so held where objections were made to evidence establishing a counter-claim so pleaded, no motion under § 128 of the code for a more specific plea, and no objections to the plea, having been made. *Meagher v. Morgan*, 3-372.

(Code 1859, § 128.) The want of sufficient certainty in the statement of facts, is not a cause of demurrer. Section 128 provides that the court may require the pleading to be made definite and certain. *Ins. Co. v. Duffy*, 2-353.

(3919) **§ 120. Counter-Claim; Set-Off.** The court, at any time before the final submission of the cause, on motion of the defendant, may allow a counter-claim or set-off, set up in the answer, to be withdrawn, and the same may become the subject of another action; on motion of either party, to be made at the time such counter-claim or set-off is withdrawn, an action on the same shall be docketed and proceeded in, as in like cases after process served; and the court shall direct the time and manner of pleading therein. If an action be not so docketed, it may afterwards be commenced in the ordinary way.

Defendant should have been permitted to withdraw her set-off under § 120, code. *Bowen v. Pickett*, 26-220.

(3920) **§ 121. Pleading on a Judgment.** In pleading a judgment, or other determination of a court or officer of special jurisdiction, it shall be sufficient to state that such judgment or determination was duly given or made; and the jurisdiction of any such court or officer shall be presumed until the contrary appears.

The general construction and understanding has been, and properly too, that this section applies only to the courts and officers of this state. *Kronberg v. Elder*, 18-152.

Section 121 refers only to judgments and orders of courts and officers of special jurisdiction, and has no application to the orders and judgments of the district court, which is a court of general jurisdiction. *Rheinbart v. State*, 14-322.

When the court that rendered judgment is one of only limited and special jurisdiction, it is sufficient on a suit on that judgment to aver that the judgment was duly rendered. *Burnes v. Simpson*, 9-663.

(Code 1859, § 130.) Section 130 of the civil code is confined to cases determined by a court or officer of special jurisdiction. In cases to which this is applicable, it is not necessary to allege jurisdiction. *Butcher v. Bank*, 2-70.

(3921) **§ 122. Pleading; Conditions Precedent.** In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegations be controverted,

the party pleading must establish, on the trial, the facts showing such performance.

Where W. contracts with T. to sell to T. a safe, in the possession and under the control of L., and contracts that L. shall deliver the same to T., and T. agrees that upon delivery thereof he will pay \$15, and L. refuses absolutely to deliver the safe: *Held*, That T. may at once, and without a tender of the \$15, commence an action against W. for the damages sustained by T. on account of the failure and refusal of L. to deliver the safe. *Thompson v. Warner*, 31-533.

(3922) **§ 123. Pleading on Written Instrument.** In an action, counter-claim or set-off, founded upon an account, promissory note, bill of exchange or other instrument, for the unconditional payment of money only, it shall be sufficient for a party to give a copy of the account or instrument, with all credits, and the indorsements thereon, and to state that there is due to him, on such account or instrument, from the adverse party, a specified sum, which he claims, with interest. When others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties in the action, it shall be necessary to state, also, the kind of liability of the several parties, and the facts, as they may be, which fix their liability.

If the legislature had intended any further restriction in § 555, it would have used language as in § 123 of the code, where it names "other instrument for the unconditional payment of money only." *Water Power Co. v. Brown*, 23-696.

Suit on sidewalk bonds of city. *Wyandotte v. Zeitz*, 21-656.

Where a petition on a promissory note sets out the note in full, and makes it a part thereof, an omission to attach a copy is not such an error as will authorize a reversal of the judgment. *Budd v. Kramer*, 14-104.

Question cannot be made in the supreme court for the first time, of failure to attach copy of notes sued on to the petition. *Andrews v. Alcorn*, 13-351.

A bill of particulars in the name of certain parties, as partners plaintiff is sufficient for a justice's court at least, even if there is no formal averment that plaintiffs were partners. *Campbell v. Blanke*, 13-64.

When a married woman executes a note in payment of her husband's debt, an action may be maintained thereon, and her separate property applied in payment of the same. *Deering v. Boyle*, 8-526.

(*Code 1859, § 122.*) Suit on an order drawn in blank as to drawee but accepted, must allege apt words of liability, and it is not a promissory note. *Bliss v. Burnes*, McC.-91.

(3923) **§ 124. Private Statute; Judicial Notice.** In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title, and the day of its

approval, and the court shall thereupon take judicial notice thereof.

Courts will take judicial notice of the laws of the state, and of the books of the published laws, of what the enrolled bills contain, and of what the legislative journals contain, and of everything that is allowed to affect the validity or meaning of any law in any respect. *Division Howard Co.*, 15-195.

Judicial notice will be taken of the general laws of this state. *City of Tepeka v. Tuttle*, 5-311.

Courts of this state do not take judicial notice of the laws of other states *Porter v. Wells*, 6-455; *Shed v. Augustine*, 14-282.

Courts of this state do not take judicial notice of private statutes of this state. *A. T. & S. F. R. R. v. Blackshire*, 10-487.

Nor of corporation of cities. *State v. Pittman*, 10-593.

(*Code 1853*, § 133.) The provision of § 1, ch. 68, L. 1855, p. 342, providing that printed statute books of the territory shall be evidence of the private acts therein, facilitates but does not dispense with proof thereof. *Walker v. Armstrong*, 2-200.

(3924) **§125. Libel or Slander; Pleading and Proof.** In an action for libel or slander, it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff; and if the allegation be denied, the plaintiff must prove, on the trial, the facts, showing that the defamatory matter was published or spoken of him.

Defendant may deny using the language in slander, and may also allege and prove said language was true. *Cole v. Woodson*, 32-275.

(3925) **§126. Libel and Slander; Defense.** In the actions mentioned in the last section, the defendant may allege the truth of the matter charged as defamatory, and may prove the same, and any mitigating circumstances, to reduce the amount of damages, or he may prove either.

Courts take judicial notice of the public statutes of their own state, and these need to be neither pleaded or proved. But the rule is otherwise with the present laws. *A. T. & S. F. R. R. v. Blackshire*, 10-487.

Defendant may deny using the language in slander, and may also allege and prove said language was true. *Cole v. Woodson*, 32-275.

(3926) **§127. Real Property; Description.** In any action for the recovery of real property, it shall be described with such convenient certainty as will enable an officer holding an execution to identify it.

(3927) **§128. Allegation Taken as True; Demurrer.** Every material allegation of the petition, not controverted by the answer, and every material allegation of new matter in the answer, not controverted by the reply, shall, for the purposes of the action, be taken as true; but the allegation of

new matter in the reply shall be deemed to be controverted by the adverse party, as upon direct denial or avoidance, as the case may require. A demurrer to a reply shall not be held to admit any of the facts alleged in such reply for any purpose other than to determine the sufficiency thereof. Allegations of value, or of amount of damages, shall not be considered as true, by failure to controvert them; but this shall not apply to the amount claimed in actions on contract, express or implied, for the recovery of money only.

Allegations of value or amount of damages are not admitted by failure to controvert them. Even upon default they must be proved. *U. P. R. R. v. Pillsbury*, 29-653.

In an action brought for the recovery of real property, and damages for its detention, "another," or second trial, cannot be granted to the defendant under the terms of § 599 of the code, without any showing therefor, as matter of right, where such defendant fails to demur, answer or otherwise appear until after the judgment is rendered upon default. *Hall v. Sanders*, 25-538.

The allegations in the reply are, under our system of pleading, to be deemed controverted by the defendants without any formal denial of the same on their part. *Board v. Shaw*, 15-41.

A mere denial of indebtedness on the note or contract is no denial of the execution of either. When the execution of a written instrument is admitted by the pleadings, its legal effect must follow. *Reed v. Arnold*, 10-104; *Gulf R. R. v. Wilson*, 10-111, 112.

Error to dismiss petition when defendant is in default. *Brenner v. Bigelow*, 8-500.

A reply which denies every "material" allegation of the answer is sufficient. *Miller v. Brumbach*, 7-343.

Suit on promissory note; general denial raises no issue, and the admission of the execution of the note admits that the note is past due and payable, and will not entitle the defendant to demand a jury for the assessment of damages. *Douglas v. Rhinehart*, 5-393.

(*Comp. Laws 1862*, § 137.) Defendant in default who has neither answered or demurred, has not thereby waived his right to appear at the trial and object to the sufficiency of a petition which shows that the claim is barred. *Zane v. Zane*, 5-139.

(*Code 1862*, § 137.) Instruction that they must find \$100 for plaintiff, if they found for him at all, "as for money spent for medical attendance," was wrong under this section, but as they only found for plaintiff \$35, the plaintiff in error was not prejudiced, and the error is immaterial. *Taylor v. Clendenning*, 4-533.

(*Code 1859*, § 137.) *Quære*: Was a replication absolutely necessary to an allegation that, by the non-performance of certain covenants on the part of the plaintiff, the defendant had been damaged to the amount of \$500. *Osgood v. Haverly*, McC.-183.

(3928) **§ 129. Material Allegation.** A material allegation, in a pleading, is one essential to the claim or defense, which could not be stricken from the pleading without leaving it insufficient.

(3929) **§ 130. Pleading; Presumptions.** Neither presumptions of law nor matters of which judicial notice is taken, need be stated in the pleading.

Presumptions of law need not be stated in the pleading. But this is not the rule as to presumptions of fact. As a general rule, all the facts which are ingredients in the cause of action must be specifically alleged in the petition, even though upon the trial proof of certain of those facts will raise a presumption, and be therefore *prima facie* evidence of the existence of other facts. *Draper v. Cowles*, 27-488.

Neither does it appear that this act of the legislature has ever been accepted by the government of the United States. It is true that the plaintiff's petition alleges that the government has accepted all the rights and privileges attempted to be conferred by such act. But neither presumptions of law, nor matters of which judicial notice is taken, need be stated in the pleading. And if the same should be stated, whether correctly or incorrectly, the statement amounts to nothing. *Fort L. R. R. v. Lowe*, 27-756.

Judicial notice may be taken that the 5th day of November, 1872, was a general election day, and a day to fill vacancies in a county office. *Ellis v. Reddin*, 12-307.

(3930) **§ 131. Tender.** When a tender of money is alleged in any pleading, it shall not be necessary to deposit the money in court when the pleading is filed, but it shall be sufficient if the money is deposited in court at the trial, or when ordered by the court.

(3931) **§ 132. Lost Pleadings.** If an original pleading be lost, or withheld by any person, the court may allow a copy thereof to be substituted.

MISTAKES IN PLEADING AND AMENDMENTS.

(3932) **§ 133. Variance; Mistakes.** No variance between the allegations, in a pleading, and the proof, is to be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled, and thereupon the court may order the pleading to be amended, upon such terms as may be just.

Amending pleadings after instructions, not error in this case. *Baird v. Truitt*, 18-123.

Suit for specific performance may be changed to suit for quieting title. *Newell v. Newell*, 14-202.

While district court may permit the amendment of an appeal bond insufficient in form or amount, it may also, in the exercise of a sound discretion, refuse to permit any amendment (on an appeal from justice of the peace). *Gates v. Sanders*, 13-411.

Where a party has obtained, through legal proceedings, an unjust advantage, and in these proceedings has made a mistake, be it ever so trivial, the law will not tolerate an amendment to secure him in his advantage. But when it is in furtherance of justice, the law looks tolerantly on mistakes, and seeks to uphold whatever is honestly attempted to be done. *Foreman v. Carter*, 9-674.

Granting and refusing amendments is largely within the discretion of the court. *Clark v. Spencer*, 14-398; *K. P. R. R. v. Salmon*, 14-526; *Taylor v. Clendenning*, 4-524; *Davis v. Wilson*, 11-74.

The code, § 141, authorizes the district court to permit a plaintiff to amend the petition, after overruling a demurrer thereto. *Moore v. Wade*, 8-380.

Correcting a mistake in the name of party, where that party is fully described in the pleading, does not change substantially the claim or defense, and is no ground for reversal. *Dewey v. McLain*, 7-126.

Plaintiffs' name may be changed by striking name of one of plaintiffs from the proceedings, and cause may proceed in favor of other plaintiffs. *K. P. R. R. v. Nichols*, 9-235.

Refusal to allow verification of answer putting execution of note in issue, not error, there being no showing of diligence or merits. *Foote v. Sprague*, 13-155.

If there be a variance between petition and proof, yet if it be a case where an amendment will be allowed, the judgment will not be reversed. *M. V. R. R. v. Caldwell*, 8-244.

Amendments may be made by interlineation, by writing on a separate paper, and third, by re-writing whole and incorporating the amendment. Where it is short, the court may permit interlineation. *Fitzpatrick v. Gebhart*, 7-35.

Where answer pleads statute of limitations, it is not error, at the close of the evidence, to refuse plaintiff leave to amend by alleging that the fraud of defendant had not been discovered until within two years next before suit. *Hiatt v. Auld*, 11-176.

No error will be presumed from the mere fact that the officer's return shows that a summons issued against "L. J. D." was served on "L. A. D.," and certainly none which can be taken advantage of for the first time on error. If the right party was in fact served, the most that could be done would be to allow the officer, on motion in the court below, to amend his return. *Dutton v. Hobson*, 7-196.

Return on summons may be amended. *Kirkwood v. Reedy*, 10-453.

A plaintiff who obtains leave to amend his petition, must file his amendment within the time prescribed, or not at all, unless further leave be given.

Notice of the filing of such amendment, or amended petition, must be given to the defendant, unless such notice is waived. *Haight v. Schuck*, 6-192.

Suit under § 422, code, for causing death of passenger; amendment, setting out that deceased was an employé, allowed. *K. P. R. R. v. Salmon*, 14-512.

Where a petition sets forth a cause of action on a promissory note, and the answer sets forth a payment made thereon, and where the reply of plaintiff to the answer admitted the facts set forth in the answer, a motion to so amend the reply as to deny the payment set forth in the answer is one for an amendment to change, substantially, the plaintiff's claim, and, under § 147 of the code, should be overruled. *Irwin v. Paulett*, 1-418.

The amending of petition by plaintiff, by allowing insertion of word "petition" in the caption, should be permitted at any time, and is no cause for delay by defendant. *Butcher v. Bank*, 2-70.

Amendment in this case, after the evidence is in, not changing substantially the cause of action, held not error. *State v. Commissioners*, 12-445.

(3933) **§134. Variance Not Material.** When the variance is not material, as provided in the last section, the court may direct the fact to be found, according to the evidence, and may order an immediate amendment without cost.

Amendment of pleadings after instructions given, not abuse of discretion in this case. *Baird v. Truitt*, 18-124.

No abuse of judicial discretion being shown in permitting amendment after the evidence is in, not changing substantially the cause of action, no error. *Prater v. Snead*, 12-449.

(3934) **§135. Failure of Proof; Not a Variance.** When, however, the allegation of the claim or defense, to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within the last two sections, but a failure of proof.

(3935) **§136. Amendment before Answer.** The plaintiff may amend his petition without leave, at any time before the answer is filed, without prejudice to the proceedings; but notice of such amendment shall be served upon the defendant or his attorney, and the defendant shall have the same time to answer or demur thereto as to the original petition.

It is error for a court to allow a pleading to be amended in a material respect, and then to render judgment thereon in the absence of the adverse party, and without any notice to him. And such amendment is erroneous, even where the action originated in a justice's court, and the amendment relates only to the amount claimed by plaintiff as attorney fees recoverable in the action. *L. L. & G. R. R. v. Van Riper*, 13-319.

Error for justice to render judgment on plaintiff's amended bill of particulars, without the defendant having notice of the amendment, but the error is immaterial. *Alvey v. Wilson*, 9-404.

The plaintiffs below had a right to amend their petition at the time they did, by filing an amended petition, as they did, without leave of court. * * * Besides, the district court ratified the filing of the same by refusing to strike it from the files, or to dismiss the action on account thereof. The amended petition was duly served upon the defendants' attorneys, as required by § 136 of the civil code. *Pierce v. Myers*, 28-368.

The code gives the defendant ten days from the filing of an amended petition to answer the same: but unless notice of filing of the amended petition is given to or waived by the defendant, there is no default on his part on a failure to answer. *Haight v. Schuck*, 6-192.

(3936) **§ 137. Amendment on Demurrer.** At any time within ten days after the demurrer is filed, the adverse party may amend, of course, on payment of costs since filing the defective pleading. Notice of the filing of an amended pleading shall be forthwith served upon the other party or his attorney, who shall have the same time thereafter to answer or reply thereto, as to an original pleading.

The code gives the defendant ten days from the filing of an amended petition to answer the same; but unless notice of filing the amended petition is given to or waived by the defendant, there is no default on his part on a failure to answer. *Haight v. Schuck*, 6-192.

(3937) **§ 138. Demurrer Overruled; Answer.** Upon a demurrer being overruled, the party who demurred may answer or reply, if the court be satisfied that he has a meritorious claim or defense, and did not demur for delay.

(*Code 1859, § 146.*) The defendants could only claim to file their amended answer out of time by showing to the satisfaction of the court a meritorious defense, and that they did not demur for delay. *Pemberton v. Hoosier*, 1-115.

(3938) **§ 139. Amendment at any Time.** The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or conform the pleading or proceeding to the facts proved, when such amendment does not change substantially the claim or defense; and when any proceeding fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment.

Granting leave to amend petitions is largely in the discretion of the court. *Burtis v. Wait*, 33-482.

Original application under § 77, to open a judgment and defend, having

been made in time, and such as unquestionably to challenge the consideration of the court, it had, under § 106 and § 139, the right to permit amendments of the application. *Albright v. Warkentin*, 31-445.

Affidavit for publication, "to the best of his knowledge, information, and belief," made by agent, is defective and insufficient, yet not wholly void; therefore, as the amended affidavit was positive and sufficient, the court erred in not permitting the affidavit for publication to be amended. (5-287; 21-124.) *Harrison v. Beard*, 30-533.

Where an action is commenced before a justice of the peace, and the defendant appeals to the district court, that court has the power, in furtherance of justice, after all the evidence is submitted, to permit the plaintiff upon the payment of all the costs, to amend his bill of particulars so as to show that he is seeking to recover as the administrator of an estate, and not in his individual capacity. *Reed v. Cooper*, 30-574.

As the district judge, having the case at chambers, had the right to permit the defective affidavit to be amended, and as the allowance of the amendment asked to be made by plaintiffs was in the furtherance of justice, such application should have been granted. (4-42; 5-293; 10-396; 19-567.) *Wells v. Danford*, 28-490.

Sec. 147, code 1859, same as § 139 present code, altered to allow judge power to dissolve an attachment in vacation. Sec. 147 of the code of 1859, prior to the amendment of 1865, was sufficiently broad in its terms to authorize defective affidavits in attachments to be amended upon the order of the court. *Wells v. Danford*, 28-490.

Upon a judgment in favor of A., an appeal bond is filed running to B., and there is no connection or relation of any kind between A. and B. One has nothing to do with the suit of the other, and no special equities are shown. The bond given is not irregular or defective; it is void, amounts to nothing, and furnishes no basis sufficient to compel an amendment. (13-411.) *Lovitt v. W. & W. R. R. Co.*, 26-299.

As both parties were present in court at the time of the order and the amendment, and as the permission to amend was granted in the furtherance of justice, § 139 of the code fully authorized the action taken. *Neifert v. Ames*, 26-517.

Defective allegations in a petition may sometimes be cured by subsequent proceedings in the case. *Grandstaff v. Brown*, 23-178.

Such affidavit and publication were at most only voidable, and as the affidavit for publication, and the affidavit in proof of publication, were both amended and made sufficient before either of the affidavits or the publication was set aside or voided, neither of them will now be set aside or voided. *Pierce v. Butters*, 21-129.

A justice of the peace has the power, in furtherance of justice, to permit the amendment of a bill of particulars, by striking out the name of a party plaintiff and substituting the name of another party as plaintiff, and when the grounds of such amendment are not disclosed in the record there is no error. *Hanlin v. Baxter*, 20-134.

In this state the district court may permit an amendment to be made to

any "pleading, process or proceeding" "before or after judgment;" and where "such amendment does not change substantially the claim or defense," there is no limitation upon the power of the court to allow such amendment, except the requirement that the amendment must be made "in furtherance of justice." (6-456; 12-447.) *Baird v. Truitt*, 18-123.

Suit under § 422, code, for causing death of passenger; amendment, setting out that deceased was an employé, allowed. *K. P. Rly. v. Salmon*, 14-520.

Amendment of petition after the evidence in, changing description as to part of plaintiff's cause of action, not substantially changing the cause of action, and where no abuse of discretion is shown, not error. *Prater v. Snead*, 12-447.

Even after judgment, if the defendant had raised the question, the plaintiff could have amended his bill of particulars so as to make it correspond with the facts proved, and show that the cause of action was not barred. *Hawley v. Histed*, 10-268.

It is not error for the court to allow during the trial, on motion of the plaintiffs, the name of one of the plaintiffs to be stricken from the proceedings, and the cause to proceed in favor of the other plaintiffs. *K. P. Rly. v. Nichols*, 9-235.

The plaintiff may dismiss his action as to those who are not liable, and take judgment against those who are shown to be liable. *Silvers v. Foster*, 9-60.

Court has power to allow substitution of administrator as plaintiff, but pleadings should be filed showing his right to recover. *Atchison v. Twine*, 9-357.

Suit on note alleged to be made in *April*; amendment at the trial, alleging the note was made in *March*, not error. *Wilson v. Phillips*, 8-212.

Correcting a mistake in the name of the plaintiff, where he is fully described in the pleadings, not error. *Dewey v. McLain*, 7-126.

Additional parties plaintiff may be made, and the action then proceed to judgment. *National Bank v. Tappan*, 6-470.

A defendant who has answered a petition is not in default because an amended petition is filed making a new party plaintiff to which no new answer is filed. *Stevens v. Thompson*, 5-305.

(*Code 1859*, § 147.) The amendment changed substantially and materially the defense, and was therefore properly rejected under § 147 of the code. *Scott v. Smith*, 2-445.

(*Code 1859*, § 147.) The court should not permit reply admitting payment set up in the answer to be amended, so as to deny payment; it changes substantially the claim or defense. *Irwin v. Paulett*, 1-427.

Amendments may be made (1) by interlineation, (2) by writing on separate paper, (3) by re-writing. *Fitzpatrick v. Gebhart*, 7-35.

(3939) **§ 140. Immaterial Errors.** The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

"And for a further answer and second defense"—this numbers it, divides it from all that has preceded, and makes the two defenses beyond all possibility of confusion or doubt, separately stated and numbered. Any other construction disregards the requirements of § 140. *Mundy v. Wright*, 26-177.

It must be remembered that in order to entitle the plaintiff in error to a reversal of the judgment of the court below, he must not only show error, but the error must appear to be material and substantial. *Knox v. Noble*, 25-451. ✓

Action for ejectment, rents, and profits, and partition may be united in one action. *Scarborough v. Smith*, 18-405.

It is only substantial error that will authorize the reversal of a judgment. *Eastman v. Godfrey*, 15-342. ✓

Setting out the note in full in the petition, and failing to attach a copy, is not such defect as would sustain a demurrer. *Budd v. Kramer*, 14-103.

Foreclosure of mortgage notes constitute more than one cause of action. *Ambrose v. Parrott*, 28-693; *Andrews v. Alcorn*, 13-351.

Immaterial errors will not require a reversal. *K. P. R. R. v. Pointer*, 9-626. ✓

✓ If the case is wrongly entitled, this was no cause for dismissal, only to correct the title of the action, and is no cause for reversal. *Gulf R. R. v. Owen*, 8-414. ✓

When appeal bond is simply irregular or defective, under §§ 139 and 140 of the code, and § 131 of the justices' act, the appellant should be permitted to supply a new one in place of the defective bond; but the bond as filed in this case was an absolute nullity. It was not a bond to the party in interest, but one running to a stranger, and furnishes no basis for amendment. *Lovett v. W. & W. R. R.*, 26-298.

✓ Name of plaintiff may be changed. *Dewey v. McLain*, 7-126.

Error must be affirmatively shown. *Hall v. Jenness*, 6-363. ✓

The entering of the judgment for the plaintiff before the jury fee was paid, although an irregularity, is not such as affects the substantial rights of the defendant. *Topeka v. Tuttle*, 5-314.

Reply denying each and every allegation of the answer, setting up a counter-claim, is good, although the answer contains set-off instead of counter-claim. *Anthony v. Stinson*, 4-219.

(*Code 1859, § 148.*) The action of the court in permitting a party to amend by inserting the word petition, which had been omitted, was so manifestly correct that we need not argue it. *Butcher v. Bank*, 2-66.

(3940) **§ 141. Demurrer Sustained; Amendment.** If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court, in its discretion, shall direct.

(3941) **§ 142. Continuance.** When either party shall amend any pleading or proceeding, and the court shall be satisfied, by affidavit or otherwise, that the adverse party could not be ready

for trial, in consequence thereof, a continuance may be granted to some day in term, or to another term of the court.

✓ (3942) **§143. Unknown Defendant.** When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated, in any pleading or proceeding, by any name or description; and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff, in such case, must state in his petition that he could not ascertain the true name; and the summons must contain the words, "real name unknown," and a copy thereof must be served personally upon the defendant.

(3943) **§144. Supplemental Pleadings.** Either party may be allowed, on notice, and on such terms, as to costs, as the court may prescribe, to file a supplemental petition, answer or reply, alleging facts material to the case, occurring after the former petition, answer or reply.

Granting leave to amend petitions is largely in the discretion of the court. *Burtis v. Wait*, 33-482.

Action to quiet title; when M. & K. became the owners of the title of C. M., subsequent to the commencement of the action, they had the right, with the consent of the court, to file the supplemental petition, setting up their claim under such title, notwithstanding the allegations of such supplemental petition were in conflict with the original petition filed by them. *Williams v. Morehead*, 33-618.

Section 144 of the code expressly authorizes that either party to the action may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition or reply alleging facts material to the case occurring after the former petition, answer or reply. *Simpson v. Voss*, 31-229.

As will be seen by § 106 of the code, the whole matter rests within the discretion of the trial court. *Tefft v. Firey*, 22-761.

If plaintiffs in ejectment desired the benefit of any rights that may have accrued to them subsequently to the filing of the petition, by reason of an after-acquired deed, they should have filed a supplemental petition under § 144. *Porter v. Wells*, 6-453.

(3944) **§145. Consolidation.** Whenever two or more actions are pending in the same court, which might have been joined, the defendant may, on motion and notice to the adverse party, require him to show cause why the same shall not be consolidated, and if no cause be shown, the said several actions shall be consolidated.

Where cases cannot be consolidated under the provisions of the statute, the court has no authority, as a matter of convenience and economy, to require several cases upon the same general subject to be considered and determined by the same jury at the same time, if the parties thereto object. *Ortman v. U. P. Rld.*, 32-419.

A motion to consolidate the separate actions, brought by the different plaintiffs to foreclose the respective mechanic's liens, even if made by defendant, should be denied. *Harsh v. Morgan*, 1-293.

(3945) **§146. Consolidation.** The order for consolidation may be made by the court, or by a judge thereof, in vacation.

ARTICLE 9—PROVISIONAL REMEDIES—ARREST AND BAIL.

SEC.

- 147. Of arrest.
- 148. The affidavit, and causes for order of arrest.
- 149. Order not to be issued until bond executed.
- 150. Order may accompany summons.
- 151. To be delivered to sheriff; its contents.
- 152. When returnable.
- 153. How executed; further orders.
- 154. Defendant to be committed.
- 155. May deposit money and be discharged.
- 156. Money, how disposed of.
- 157. The same.
- 158. Sheriff and sureties liable for such money.
- 159. Bail, when may be given, and how.
- 160. Bail may be accepted or objected to; proceeding in case of objection.

SEC.

- 161. Justification of bail.
- 162. Bail to be examined on oath.
- 163. Proceeding when bail sufficient.
- 164. Sheriff liable, when.
- 165. Liability, how fixed and enforced.
- 166. Bail adjudged insufficient, liable to sheriff.
- 167. Liability of bail, how fixed and sued.
- 168. Surrender of defendant in discharge of bail.
- 169. Bail may arrest defendant.
- 170. Bail exonerated, when.
- 171. Bail may be substituted for money deposited.
- 172. Stay of proceedings against bail.
- 173. Application to vacate order of arrest, or reduce amount of bail.
- 174. Plaintiff may oppose.
- 175. Jail fees, how paid.

(3946) **§147. Arrest.** A defendant in a civil action can be arrested, before and after judgment, in the manner prescribed by this code, and not otherwise; but this provision does not apply to proceedings for contempt; nor does it apply to actions or judgments prosecuted in the name of the state of Kansas to recover fines or penalties for crimes, misdemeanors or offenses.

(3947) **§148. Affidavit for Arrest.** An order for the arrest of the defendant shall be made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his authorized agent or attorney, stating the nature of the plaintiff's claim, that it is just, and the amount thereof, as nearly as may be, and showing one or more of the following particulars: *First*, That the defendant has removed, or begun to remove, any of his property out of the jurisdiction of the court, with intent to defraud his creditors. *Second*, That he has begun to convert his property, or a part thereof, into money, for the purpose of placing it beyond

the reach of his creditors. *Third*, That he has property, or rights of action, which he fraudulently conceals. *Fourth*, That he has assigned, removed or disposed of, or has begun to dispose of, his property, or a part thereof, with intent to defraud his creditors. *Fifth*, That he fraudulently contracted the debt, or incurred the obligation, for which suit is about to be or has been brought. The affidavit shall also contain a statement of the facts claimed to justify the belief in the existence of one or more of the above particulars.

Attorney may make affidavit for arrest in civil case. *Baker v. Knickerbocker*, 25-490.

Affidavit for arrest must contain a statement of facts claimed to justify the belief in the fraud charged, or the proceedings based upon it will be void. *Gillett v. Thiebold*, 9-427.

(3948) **§ 149. Bond; Arrest.** The order of arrest shall not be issued by the clerk, until there has been executed, by one or more sufficient sureties of the plaintiff, a written undertaking to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of the arrest, if the order be wrongfully obtained, not exceeding double the amount of the plaintiff's claim stated in the affidavit.

(3949) **§ 150. Order of Arrest.** The order may be made to accompany the summons, or at any time afterward, before the judgment.

(3950) **§ 151; Order of Arrest; Sheriff.** The order of arrest shall be addressed and delivered, with a copy of the affidavit, to the sheriff; the order shall state the name of the parties, the court in which the action is brought, and the amount of the plaintiff's claim specified in the affidavit, and shall require the sheriff to arrest the defendant, and hold him to bail in double the sum stated in the affidavit, and to make return of the order on a day to be named therein, with the undertaking of the bail, if any be given.

(3951) **§ 152. Return Day.** The return day of the order of arrest, when issued at the commencement of the suit, shall be the same as that of the summons; when issued afterward, it shall be fifteen days after it is issued.

(3952) **§ 153; Arrest, How Made.** The sheriff shall execute the order by arresting the defendant, and delivering to him a copy of the order, and of the affidavit. If the defendant cannot be found before the return day, the plaintiff shall be entitled to further orders, without another affidavit or undertaking until the defendant is arrested; but orders of arrest

shall not be issued to any other than the county in which the action is brought. ✓

(3958) **§154. Defendant Committed.** The defendant, when arrested, shall be committed by the sheriff to the jail of the county, and kept in custody until discharged by law.

(3954) **§155. Deposit Money; Discharged.** The defendant may, before or after giving bail, deposit in the hands of the sheriff, or in court, the amount of money mentioned in the order of arrest; whereupon he shall be discharged, or his bail, if any be given, shall be released.

(3955) **§156. Deposit Money.** The sheriff shall pay into court the money received by him in lieu of bail. If received in vacation, he shall pay it in on the first day of the next term; if received during a term, he shall pay it in immediately.

(3956) **§157. Deposit Money.** The court shall make proper orders for the safe keeping of money deposited in lieu of bail. It may direct the sheriff to keep the money, and, after final judgment in the action, shall order it to be paid to the party entitled thereto, according to the result.

(3957) **§158. Sheriff Liable for Deposit.** Money so deposited with the sheriff, in lieu of bail, or directed by the court to be kept by him, shall be held upon his official responsibility; and he and his sureties shall be liable, and may be proceeded against for any default in relation thereto, as in other cases of delinquency.

(3958) **§159. Bail.** Bail may be given by the defendant on his arrest, or at any time afterward, before judgment. It shall be done by causing one or more sufficient sureties to execute a written undertaking to the plaintiff, in the presence of the sheriff, to the effect that, if judgment shall be rendered in the action against the defendant, he will render himself amenable to the process of the court thereon. The undertaking, when accepted, shall be returned to the clerk's office, and the defendant discharged.

This section authorizes a defendant arrested to give bail at any time before judgment. *Baker v. Knotts*, 30-358.

Sheriff liable under common law for permitting an escape, as to actual damages, and this is not changed by the code. *Crane v. Stone*, 15-98.

(3959) **§160. Bail, Objection to.** The plaintiff or his attorney may accept the bail by indorsing such acceptance on the undertaking; or may object to the bail, for insufficiency, at any time within five days after the undertaking has been given. Within such time, he shall serve upon the sheriff a written notice that he does not accept the bail, or he shall be deemed to

have accepted it, and the sheriff shall be exonerated from liability. When the undertaking is given after return of arrest, the plaintiff shall have notice thereof.

(3960) **§ 161. Bail; Justification.** On the receipt of such notice, the sheriff or defendant may, within two days thereafter, give, to the plaintiff or his attorney, notice, in writing, of the justification of the same or other bail, before a judge or clerk of the court in which the action is brought, a probate judge or justice of the peace, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bail be given, there must be a new undertaking.

(3961) **§ 162. Bail; Examination.** For the purpose of justification, each of the bail must attend before the proper officer, at the time and place mentioned, and may be examined on oath or affirmation touching his sufficiency, in such manner as the officer may think proper.

(3962) **§ 163. Sufficient Bail.** If the officer find the bail sufficient, he shall indorse his allowance on the undertaking, and cause the same to be filed with the clerk, and the sheriff shall thereupon be discharged from liability.

(3963) **§ 164. Sheriff; Liability.** After being arrested, if the defendant escapes or be rescued, or bail be not taken, or be adjudged insufficient, or a deposit be not made, the sheriff shall be liable as bail. But he may discharge himself from liability by putting in sufficient bail at any time before judgment.

Sheriff liable under common-law rule for actual damages for permitting an escape. *Crane v. Stone*, 15-98.

(3964) **§ 165. Liability of Sheriff, How Fixed.** The return of "not found," upon an execution against the body of the defendant shall be necessary to fix the liability of the sheriff as bail, which liability shall be the amount of the judgment, interest and costs. This liability shall be enforced only in a separate action against him, or against him and his sureties on his official bond, as in other cases of delinquency.

Sheriff liable under common-law rule for actual damages for permitting an escape. *Crane v. Stone*, 15-98.

(3965) **§ 166. Insufficient Bail.** The bail adjudged insufficient, shall be liable to the sheriff for the damages he may sustain by reason of such insufficiency.

(3966) **§ 167. Liability; Bail.** The liability of the bail shall be fixed in the manner provided in section one hundred and sixty-five, for fixing the liability of the sheriff as bail, and the bail can be proceeded against in an action only.

(3967) **§ 168. Surrender of Defendant.** A surrender of the defendant to the sheriff of the county in which he was arrested, with a delivery of a certified copy of the undertaking of the bail, whether such surrender be made by the defendant himself, or by his bail, shall discharge the bail. Such surrender may be made at any time before the return day of the summons in an action against the bail. The sheriff shall give to the bail a written acknowledgment of the surrender, and hold the defendant in his custody, upon said copy of the undertaking of the bail, as upon an order of arrest. On the production of the sheriff's acknowledgment of the surrender, to the clerk of the court, an exoneration of the bail shall be entered on his undertaking.

(3968) **§ 169. Arrest Defendant.** For the purpose of surrendering the defendant, the bail, at any time and place, before he is finally charged, may himself arrest him, or by a written authority, indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

(3969) **§ 170. Bail; Exoneration.** The bail will be exonerated by the death of the defendant, or his imprisonment in a state prison, or by his legal discharge from the obligation to surrender himself amenable to the process of the court, or by his surrender to the sheriff of the county in which he was arrested in execution thereof, within the time fixed in section one hundred and sixty-eight, or within such further time as the court, in which the action is pending, may allow.

(3970) **§ 171. Bail Substituted for Deposit.** If money be deposited by the defendant on his discharge, bail may be given and justified, upon notice as prescribed in section one hundred and sixty-one, at any time before judgment; and thereupon the court in which the action is brought, on being satisfied that the bail has been given and adjudged sufficient, shall direct that the money deposited be refunded to the defendant, and it must be refunded accordingly.

(3971) **§ 172. Stay.** If, at any time before or after judgment against the bail, proceedings in error are commenced, on the judgment against the principal, in the suit in which their undertaking was taken, the court may, on motion, stay proceedings against such bail, for a reasonable time, on their paying all the costs that have accrued against them; and if, on such proceedings, the judgment against the principal shall be reversed, and the principal discharged from said suit, the bail shall be discharged from the undertaking.

(3972) **§ 173. Vacate Order, etc.** A defendant may, at any time before judgment, apply on motion to the court in which the suit is brought, if in session, and in vacation to a judge thereof, to vacate the order of arrest, or to reduce the amount of bail. Reasonable notice of such motion must be given to the plaintiff. [Laws 1876, ch. 103, § 1 (§ 173, as amended); took effect March 8, 1876.]

Section 173 is independent of § 159; the giving bail does not preclude a motion to vacate the order of arrest, and unless the statute makes the one a bar to the other, the defendant may avail himself of both. *Baker v. Knotts*, 30-358.

(3973) **§ 174. Plaintiff Oppose Motion.** If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same, by affidavits or other evidence, in addition to that on which the order of arrest was made.

(3974) **§ 175. Jail Fees; Liability of Plaintiff.** Any person causing another to be committed to jail, under the provisions of this article, shall be liable, in the first instance, for the jail fees, and shall, if required by the jailor, pay such fees weekly, in advance; and such fees, so paid, shall be a part of the costs of the case.

ARTICLE 10—REPLEVIN OF PROPERTY.

SEC.
 176. Delivery of property may be claimed, when.
 177. Affidavit of plaintiff must show what.
 178. Order not to be issued until undertaking executed by one or more sureties.
 179. Order for delivery directed to whom; its contents.
 180. Returnable, when.
 181. How executed.
 182. Defendant may have return of property, how; to be delivered to plaintiff, when.

SEC.
 183. Exception to sureties.
 184. Proceedings in the action.
 185. Judgment.
 186. Order for delivery may be issued to different counties.
 187. Officer may break open buildings, when.
 188. Court or judge may compel delivery by attachment.
 189. When order may be set aside at cost of clerk.

(3975) **§ 176. Replevin; Delivery.** The plaintiff, in an action to recover the possession of specific personal property, may, at the commencement of the suit, or at any time before answer, claim the immediate delivery of such property, as provided in this chapter.

The plaintiff *may*, not *must*; and he *may*, at the commencement of the

suit, or at any time before answer. The action exists, or may exist, before the order. The section recognizes the action, and says certain things may be done in it. The order for the delivery is ancillary. *Bachelor v. Walburn*, 23-736.

Order of delivery ought not to be issued till the summons is issued, but this irregularity may be waived by defendant. *Kennedy v. Beck*, 15-562.

A wife may maintain replevin, for property that she purchased from her husband, against an officer levying on the same for the husband's debt. *Going v. Orns*, 8-85.

Omission of *court* in writ of replevin, in body of order, is not fatal. *State v. Wilson*, 24-50.

Petition in replevin need only state owner or special owner, description, entitled to immediate possession, defendant wrongfully detains it. *Hoisington v. Armstrong*, 22-110.

➤ General denial; defendant may show that he rightfully detains the property. *Holmberg v. Dean*, 21-73.

Suit in replevin by assignee; defense, under general denial, may show deed of assignment fraudulent. *Holmberg v. Dean*, 21-73.

Case tried on a rejoinder, will not be reversed simply because that is not recognized by the laws of Kansas. *Crapster v. Williams*, 21-109.

Party reversing judgment of replevin, ought to have judgment that was rendered against him on the replevin bond set aside, if motion is made at same term, even if no supersedeas bond was given. *McMillan v. Baker*, 20-50.

➤ In replevin, any defense may be proved, under a general denial. *Bailey v. Bayne*, 20-657.

Plaintiff obtaining property and dismissing action, defendant may have right of property tried, and return adjudged. *Higbee v. McMillan*, 18-133.

Plaintiff in replevin must state his interest, right of immediate possession, and detention, and on general denial, the burden of proof is on plaintiff. *Wilson v. Fuller*, 9-176.

Answer in replevin, stating that the property is held by attachment by sheriff, as property of a third party, needs no reply. *Wilson v. Fuller*, 9-176.

Answer in replevin, that there is another action pending between plaintiff and another party, does not need reply. *Wilson v. Fuller*, 9-176.

Plaintiff may dismiss replevin action without prejudice, at any time before submission. *McVey v. Burns*, 14-291.

Plaintiff dismissing replevin suit, defendant may have his right of possession inquired into and determined, unless the property be restored to him. *McVey v. Burns*, 14-291.

Reply waived, in replevin, by going to trial. (9-177.) *Russell v. Smith*, 14-366.

Suit in replevin; general denial, and other defenses, admitting plaintiff is owner; issue raised by general denial is as to right of possession and wrongful detention. *Yandle v. Crane*, 13-344.

➤ General denial; defendant may prove his detention is rightful. *Yandle v. Crane*, 13-344.

Upon a verdict for defendant, in a replevin suit in which the property has been delivered to the plaintiff, a judgment should be entered for the return of the property; and if through the mistake or omission of the clerk it is entered simply for costs, the court may on motion modify it. *Sumner v. Cook*, 12-162.

In replevin, upon verdict for defendant, judgment should be entered in the alternative for a return of the property, or the value thereof in case a return cannot be had. *Copeland v. Majors*, 9-104.

In a replevin suit, where the verdict is in favor of the plaintiff, and it does not appear that he has already obtained the possession of articles in controversy, the judgment should be entered in the alternative for the recovery of the possession, or, in case a delivery cannot be had, for the value thereof. Where the verdict is in favor of the plaintiff for some of the articles claimed, and in favor of the defendant for the remainder, and it does not appear that defendant's possession of any has been disturbed, the defendant is entitled to no judgment, and is not prejudiced by a failure to assess the value of the articles found to be his, or damages for taking and withholding them. Judgment should not exceed amount alleged in petition. *Ward v. Master-son*, 10-77.

An action can be maintained upon an undertaking given in a replevin action, in pursuance of § 182 of the civil code, where judgment has been rendered for the plaintiff, although such judgment is entered simply for the recovery of the possession of the property, and not in the alternative for the recovery of the property or the value in case a delivery cannot be had. *Marix v. Franke*, 9-132.

Replevin cannot be maintained against one having the right of possession. In such case, if the defendant has given bonds and kept the property, judgment should be entered in his favor for costs. *Rucker v. Donovan*, 13-252.

In replevin under the code, the wrongful detention is the gist of the action, and a verdict that finds there was no wrongful detention is sufficient. *Town v. McConnell*, 8-273.

Undertaking in replevin, omitting only the clause, "if the property be delivered to him," is sufficient. *Arthur v. Wallace*, 8-267.

Where goods are replevied by A. from a sheriff who holds them by virtue of an execution against B., an answer alleging that said goods were in fact the property of B. when seized, raises a material issue, and if true, constitutes a good defense to the action. *Hall v. Jenness*, 6-356.

(3976) **§ 177. Replevin; Affidavit for Order of Delivery.** An order for the delivery of property to the plaintiff shall be made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing: *First*, A description of the property claimed. *Second*, That the plaintiff is the owner of the property, or has a special ownership or interest therein, stating the facts in relation thereto, and that he is entitled to the immediate possession of the property. *Third*, That the property is

wrongfully detained by the defendant. *Fourth*, That it was not taken in execution on any order or judgment against said plaintiff, or for the payment of any tax, fine or amercement assessed against him, or by virtue of an order of delivery issued under this article, or any other mesne or final process issued against said plaintiff; or, *Fifth*, If taken in execution, or on any order or judgment against the plaintiff, that it is exempt by law from being so taken. *Sixth*, The actual value of the property. When several articles are claimed, the value of each shall be stated as nearly as practicable.

Section 177 of the code, among other things, requires that the affidavit shall state that the plaintiff is entitled to the immediate possession of the property. This is omitted, and no other equivalent words are used as a substitute. For all that appears in the affidavit, the plaintiff had no right to the immediate possession to the property, and therefore was in no condition to maintain the action of replevin. *Paul v. Hodges*, 26-225.

Attorney may make affidavit in replevin. *Baker v. Knickerbocker*, 25-290.

In order to procure a writ of replevin, plaintiff must file in the clerk's office an affidavit showing that the property was not taken from him on any "mesne or final process issued against said plaintiff." *Blair v. Shew*, 24-283.

Although the attachment proceedings or the execution be sufficient and regular, the attachment or judgment debtor may replevy exempt, while not unexempt, property. *Watson v. Jackson*, 24-443.

The affidavit for an order of replevin, required by § 177 of the code, (Gen. Stat. 661,) is no part of the pleadings in the case; and the facts therein set forth form no part of the issues in the case, unless such facts are again set forth in the pleadings. *Hoisington v. Armstrong*, 22-110.

The defendant in this case held the property under "mesne * * * process issued against the plaintiff," and as the property was not exempt under the exemption laws, as was virtually found by the jury, could the plaintiff under any other circumstances maintain replevin for the recovery of the property? *Bailey v. Bayne*, 20-660.

Action of replevin can be maintained against an officer for the recovery of personal property which he holds by virtue of a previously-existing order of delivery, provided the plaintiff in the last action was no party to the first action or first order of delivery. The same rule obtains as to property held under an order of delivery as to that held under an execution or any other mesne or final process; and the party against whom the writ runs is the only one who may not assert his rights to the property by an action of replevin. *Gross v. Bogard*, 18-288.

Special mortgagee of personalty may maintain replevin. *Brookover v. Esterly*, 12-150.

Our statute nowhere requires either petition, answer or verdict to state the value of the articles in controversy separately. It simply provides that the affidavit for an order of delivery shall state such values separately as nearly as practicable. *Ward v. Masterson*, 10-80.

Subd. 4 is imperative, and must be alleged, sworn to, and the facts therein stated must exist (except in cases of exempt property.) *Westenberger v. Wheaton*, 8-169.

"On any order or judgment:" The word order omitted from affidavit held not to vitiate in this case. *Auld v. Kimberlin*, 7-601.

After trial on merits, on pleadings filed, the supreme court will not entertain question for first time, that no affidavit for order of replevin had been made. *Furrow v. Chapin*, 13-107.

(3977) **§178. Undertaking; Order of Delivery.** The order shall not be issued by the clerk until there has been executed in his office, by one or more sufficient sureties of the plaintiff, to be approved by the clerk, an undertaking in not less than double the value of the property, as stated in the affidavit, to the effect that the plaintiff shall duly prosecute the action, and pay all costs and damages which may be awarded against him, and if the property be delivered to him, that he will return the same to the defendant if a return thereof be adjudged.

Omitting, "if the property be delivered to him," is sufficient. *Arthur v. Wallace*, 8-267.

Appraisement in replevin is required only for fixing amount of bond. *Garrett v. Wood*, 3-231.

Precipe for process in the above action returnable according to law is sufficient. *Kennedy v. Beck*, 15-555.

✓ (3978) **§179. Order; Delivery; Contents.** The order for the delivery of the property to the plaintiffs shall be addressed and delivered to the sheriff. It shall state the names of the parties, the court in which the action is brought, and command the sheriff to take the property, describing it, and deliver it to the plaintiff, and to make return of the order on a day to be named therein.

Action for the recovery of personal property may be maintained, although no order for the delivery before judgment was issued. *Bachelor v. Walburn*, 23-733.

In an action for the recovery of specific property, an order for delivery not being issued, plaintiff need not negative the averments required in affidavit. *Bachelor v. Walburn*, 23-733.

Summons in replevin, claiming \$200, held good in this action; not error to refuse to set aside order of delivery. *Yandle v. Kingsbury*, 17-195.

Precipe for process, returnable according to law, is sufficient for summons or order of delivery. *Kennedy v. Beck*, 15-555.

Ruling on an order of delivery is immediately reviewable in supreme court. *Kennedy v. Beck*, 15-555.

(3979) **§180. Order of Delivery Returnable.** The return day of the order of delivery, when issued at the commence-

ment of the suit, shall be the same as that of the summons; when issued afterwards, it shall be twenty days after it is issued.

(3980) **§181. Order of Delivery; How Executed.** The sheriff shall execute the order by taking the property therein mentioned. He shall also deliver a copy of the order to the person charged with the unlawful detainer of the property, or leave such copy at his usual place of residence.

We suppose that it is immaterial whether possession is taken before or after the delivery of the copy. *State v. Wilson*, 24-52.

(3981) **§182. Redelivery Bond.** If, within twenty-four hours after service of the copy of the order, there is executed by one or more sufficient sureties of the defendant, to be approved by the sheriff, an undertaking to the plaintiff, in not less than double the amount of the value of the property as stated in the affidavit of the plaintiff, to the effect that the defendant will deliver the property to the plaintiff, if such delivery be adjudged, and will pay all costs and damages that may be awarded against him, the sheriff shall return the property to the defendant. If such undertaking be not given within twenty-four hours after service of the order, the sheriff shall deliver the property to the plaintiff.

An action can be maintained upon an undertaking given in a replevin action in pursuance of §182, where judgment has been rendered for the plaintiff, although such judgment is entered simply for the recovery of the possession of the property, and not in the alternative for the recovery of the property, or the value in case a delivery cannot be had. *Marix v. Franke*, 9-135.

The defendant in replevin executes a redelivery bond to plaintiff; the title remains during litigation the same, except the defendant has then the right of possession. *Turner v. Reese*, 22-319.

(3982) **§183. Exception to Sureties.** The plaintiff may, within twenty-four hours from the time the undertaking referred to in the preceding section is given by the defendant, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he must be deemed to have waived all objections to them. When the plaintiff excepts, the sureties must justify, upon notice, as bail on arrest. The sheriff or other officer shall be responsible for the sufficiency of the sureties, until the objection to them is waived, as above provided, or until they justify.

(3983) **§184. Proceedings; Trial.** If the property has been delivered to the plaintiff, and judgment rendered against him, on demurrer, or if he otherwise fail to prosecute his action to final judgment, the court shall, on application of the

defendant or his attorney, proceed to inquire into the right of property, and right of possession of the defendant to the property taken.

This section permits the defendant, in a case where the property has been delivered to the plaintiff, and the plaintiff fails to prosecute his action to final judgment, to make application to the court to proceed to inquire into the right of property and right of possession of such defendant to the property taken. This application embodies a claim to the property, and a return of the property. *Higbee v. McMillan*, 18-139.

Plaintiff may dismiss action without prejudice, after he has obtained possession of the property, at any time before a final submission, and the defendant may, notwithstanding such dismissal, have his rights determined. *McVey v. Burns*, 14-293.

(3984) **§185. Judgment; Replevin.** In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or the value thereof in case a delivery cannot be had, and of damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same.

When a chattel mortgagee brings replevin to recover the possession of the mortgaged property, and the defendant by giving bond retains possession, and the jury finds the value of the mortgaged property to be greater than the mortgage debt and interest, the judgment should be for the recovery of the property, or the debt and interest, and not for the recovery or the value of the property. *Wolfley v. Rising*, 12-535.

The defendant might waive or abandon a part of the judgment to which the findings entitled him, and such waiver or abandonment did not bar him from any other judgment in his favor warranted by the findings of fact and conclusions of law, and his failure to claim a return of the property replevied, and have judgment for a return of it, did not and does not bar him of his right to judgment for costs. *Cowling v. Greenleaf*, 32-395.

In replevin, the judgment may be for the possession, or the value thereof in case a delivery cannot be had. *Bachelor v. Walburn*, 23-736.

As §185 provides that in all actions to recover the possession of personal property, if the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment may be for the value in case a return cannot be had, and damages for taking and withholding the same; upon said application being made, as provided for in §184, by the defendant, a like judgment may be entered as set forth in §185, when defendant claims a return of the property. *Higbee v. McMillan*, 18-139.

An order of the justice discharging an attachment is not a final judgment. *Butcher v. Taylor*, 18-160.

In replevin, upon verdict for defendant, on appeal from justice's court, judgment should be entered in the alternative for a return of the property, or the value thereof in case a return cannot be had. *Copeland v. Majors*, 9-105.

The plaintiff has a right to return the property delivered to him under an order of replevin, if the judgment be against him, and it is error for the court to deprive him of that right. *Hall v. Jenness*, 6-365.

Judgment may be for full value, and damages and costs. *Griffiths v. Wheeler*, 31-17.

Where plaintiff obtains judgment, and is in possession of the property at the time of judgment, it is not proper to render judgment for value of the property, in case a return cannot be had. *Mills v. Kas. Lumber Co.*, 26-574.

Proceedings under ch. 161, L. 1881, to take in custody cattle said to have Texas disease, not binding on owner, and he may maintain replevin. *Verner v. Bosworth*, 28-670.

Defense stray hogs; special findings; failure to show they were stray, will not overturn judgment for plaintiff. *Partonier v. Pretz*, 24-238.

Justice gives judgment for plaintiff, and then modifies it, giving plaintiff only part; on error, the district court may affirm this. *Starr v. Hinshaw*, 23-532.

Judgment for return, and damages for detention, cannot be sustained against one not claiming any right to possession. *Ladd v. Brewer*, 17-204.

Judgment for the all chattels sued for, error in instruction as to one; new trial must be granted. *Hallowell v. Milne*, 16-65.

Joint judgment in replevin against sheriff and plaintiff in execution, error in this case. *Furrow v. Chapin*, 13-107.

Suit in replevin; finding of title only by right of stoppage *in transitu*, not a fatal variance. *Rucker v. Donovan*, 13-251.

Where verdict is for defendant, and plaintiff has the property, judgment should be for the return of the property, and may be modified so as to be correct. *Sumner v. Cook*, 12-162.

Judgment for the plaintiff should be in the alternative, when he has not the possession. *Ward v. Masterson*, 10-77.

Judgment for plaintiff for part; defendant in possession is not prejudiced by failure to find value of his part, or damages. *Ward v. Masterson*, 10-77.

Judgment should not exceed sum stated in petition. *Ward v. Masterson*, 10-77.

Judgment for defendant should be in the alternative. *Copeland v. Majors*, 9-104.

Judgment for plaintiff in replevin, not in the alternative, action will lie on the bond. *Marix v. Franke*, 9-132.

Judgment should be in the alternative, but unless party prejudiced, error will be disregarded. *Marix v. Franke*, 9-132.

Judgment for value, and value paid, party paying obtains the title. *Marix v. Franke*, 9-132.

Judgment that plaintiff have possession of property described, or its value, proper. *Arthur v. Wallace*, 8-267.

Judgment for defendants, where plaintiff gets the property, must be in the alternative. *Hall v. Jenness*, 6-356.

(3985) **§ 186. Order to Different Counties.** An order may be directed to any other county than the one in which the action is brought, for the delivery of the property claimed. Several orders may issue at the same time, or successively, at the option of the plaintiff; but only one of them shall be taxed in the costs, unless otherwise ordered by the court.

(3986) **§ 187. Break Open Buildings.** The sheriff or other officer, in the execution of the order of delivery, may break open any building or inclosure in which the property claimed, or any part thereof, is concealed, but not until he has been refused an entrance into said building or inclosure and the delivery of the property, after having demanded the same.

The statute does not require the order of replevin to be served before the property can be taken. *State v. Wilson*, 24-52.

(3987) **§ 188. Delivery by Attachment.** In an action to recover the possession of specific personal property, the court, or judge in vacation, may, for good cause shown, before or after judgment, compel the delivery of the property to the officer or party entitled thereto, by attachment, and may examine either party as to the possession or control of the property. Such authority shall only be exercised in aid of the foregoing provisions of this article.

And delivery may be enforced after judgment by attachment, as for a contempt. *Bachelor v. Walburn*, 23-736.

A plaintiff in a replevin action may, notwithstanding he has obtained possession of the property under the writ, at any time before a final submission, dismiss such action without prejudice; and if he does, the defendant may still have his rights of property determined. *McVey v. Burns*, 14-291.

(3988) **§ 189. Order of Delivery, Invalid.** Any order for the delivery of property, issued under this article, without the affidavit and undertaking required, shall be set aside at the cost of the clerk issuing the same, and such clerk, as well as the plaintiff, shall also be liable, in damages, to the party injured.

ARTICLE 11—ATTACHMENT.

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- 190. Grounds upon which plaintiff may have attachment.
- 191. Affidavit shall state what.
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- 231. Who may grant attachment; affidavit.
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- 233. Order to specify amount.
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- 235. Judgment not given until claim is due.
- 236. What proceedings to regulate attachments granted by court or judge.

(3989) §190. **Grounds.** The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated: *First*, When the defendant, or one of several defendants, is a foreign corporation, or a non-resident of this state, (but no order of attachment shall be issued on the ground or grounds in this clause stated, for any claim other than a debt or demand arising upon contract, judgment or decree, unless the cause of action arose

wholly within the limits of this state, which fact must be established on the trial;) *Second*, When the defendant, or one of several defendants, has absconded with intention to defraud his creditors; or, *Third*, Has left the county of his residence to avoid the service of summons; or, *Fourth*, So conceals himself that a summons cannot be served upon him; or, *Fifth*, Is about to remove his property, or a part thereof, out of the jurisdiction of the court, with the intent to defraud his creditors; or, *Sixth*, Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or, *Seventh*, Has property or rights in action, which he conceals; or, *Eighth*, Has assigned, removed or disposed of, or is about to dispose of, his property, or a part thereof, with the intent to defraud, hinder or delay his creditors; or, *Ninth*, Fraudulently contracted the debt, or fraudulently incurred the liability or obligations for which suit is about to be or has been brought; or, *Tenth*, Where the damages for which action is brought are for injuries arising from the commission of some felony or misdemeanor, or the seduction of any female; or, *Eleventh*, When the debtor has failed to pay the price or value of any article or thing delivered, which by contract he was bound to pay upon delivery. [L. 1870, ch. 87, § 4 (§ 190, as amended); took effect May 12, 1870.]

An attachment against property can be had only in a civil action for the recovery of money at or after the commencement of the action, and by making and filing a proper affidavit of the plaintiff, his agent or attorney, showing the nature of the plaintiff's claim, that it is just, the amount which the affiant believes the plaintiff ought to recover, and the existence of one or more of the grounds for attachment mentioned in § 190 or § 230 of the code. *Rullman v. Hulse*, 33-670.

In order to come within the provisions of this section allowing attachment for failure "to pay the price or value of any article or thing delivered, which by contract he was bound to pay upon delivery," there should not only be a contract between the parties that the property should be paid for on delivery, but the understanding and intention of the vendor that the property should be so paid for on delivery should continue down to the time when the property was actually delivered. *Young v. Lynch*, 30-209.

Action under § 230, and then attempt made to change it to bring it under § 190. In an application for an order of attachment under § 230, *et seq.*, of the civil code, before the claim is due, if the order of attachment is not granted, then the action must be dismissed. And if the order of attachment is granted, but should afterwards be set aside for the reason that the grounds therefor were not true, then the action should also be dismissed. *Pierce v. Myers*, 28-369.

Of course an attachment cannot rightfully be issued before the action (cf

which it is only an incident) is commenced. * * * The action was commenced when the petition and precipe were filed, and when summons was issued. *Dunlap v. McFarland*, 25-491.

The decision of 3-437 was declared in 1866, and in 1870 the legislature reenacted the section of the code of 1859 interpreted by that decision. Therefore it is not improper to say the law-making power of the state adopted the judicial construction given to the statute by the supreme court in 1866. *Stone v. Boone*, 24-341.

Where one partner, before the adjustment of partnership accounts, brings an action against his copartner, he cannot maintain an attachment against the property of the defendant on the ground of the non-residence of the latter, unless the cause of action arose wholly within the limits of this state. *Stone v. Boone*, 24-337.

Where a cause of action is founded upon a promissory note, a district court may obtain jurisdiction both of the subject-matter of the action and the parties to the suit, although the parties may be non-residents of this state, and although the cause of action may have arisen in another state. *Payne v. Nat. Bank* 16-147.

When, at the time an action was instituted in the district court of Douglas county, the defendant was a non-resident of and absent from the state, but had property in that county which plaintiff sought to reach by attachment, *held*, that the court had jurisdiction, and the property having been moved into Shawnee county before the levy of the attachment, might be regularly attached in that action by a levy thereon of an attachment in said latter county. Such attachment will take priority of one subsequently levied on the same property in a suit commenced in Shawnee county. *Taylor v. Carney*, 4-542.

A resident of the state can become a non-resident only by *leaving the state* with the intention of becoming a non-resident. *Ballinger v. Lantier*, 15-610.

A party is entitled to an attachment only when certain facts exist, not when there is probable cause to believe they exist. If they do not exist, the attachment is wrongfully issued, and the party causing it to issue is liable for all the damages actually sustained. *McLaughlin v. Davis*, 14-169.

Where an order of attachment is issued at the commencement of an action, and the clerk fixes the return day thereof at twenty days from its date, instead of within ten days, as prescribed by law, the order of attachment is not void for that reason, and the sheriff may serve the same at any time within ten days from its date. *Smith v. Payton*, 13-364.

Non-resident defendants, when the attachment is issued, cannot have the same discharged, or an undertaking required from the plaintiff, by the defendants becoming residents. *Farmer v. Kelley*, 10-313.

Objection that the affidavit says, "One of the above-named 'debtors' has absconded," etc., the statute reads "*defendant*, or one of several *defendants*," the point made by the objection is too fine. *Ferguson v. Smith*, 10-406.

Trials by jury and attachments are both allowed in actions "for the recovery of money," but it does not therefore follow that an attachment does

not lie in an action to foreclose a mechanic's lien. *Gillespie v. Lowell*, 7-424.

Where a party has assigned any portion of his property for the purpose of defrauding his creditors, such act will sustain an order of attachment issued against him on such grounds. *Johnson v. Laughlin*, 7-359.

The affidavit to authorize the issue of an order of attachment must be made by the plaintiff, his agent or attorney. Where, without such an affidavit, an order of attachment is issued, real estate seized, service made by publication, and judgment entered by default, there was no jurisdiction of the person or the property, and the entire proceedings will be set aside on motion. *Manley v. Headley*, 10-88.

Where one of two contractors is a resident of the state, and the other is a non-resident, an attachment may be sued out and maintained against such non-resident. *Jefferson Co. v. Swain*, 5-382.

(*C. L. 1862, § 199.*) Original affidavit is defective and insufficient, (1) when it states plaintiff's claim so indefinitely that it cannot be understood therefrom, whether the claim is on tort or contract; (2) if on tort, when it does not state that the cause of action arose wholly within the state; (3) when it does not state claim is just; (4) when it does not state the amount plaintiff ought to recover. An amended affidavit that does not relate back to the time of filing the original affidavit, is defective, but a second amendment may be allowed. *Robinson v. Burton*, 5-294.

(*Code 1859, § 199.*) Action for an accounting by partner against other partner. *Held*, That the action was not a demand arising upon contract, within the meaning of § 199, and that therefore the plaintiff could not have attachment, if his application was founded solely on the ground of the non-residency of the defendant; but, *semble*, the action being a civil action for the recovery of money within the meaning of that section, he might have attachment on any other of the grounds enumerated therein, and on the ground in question, had he shown a promise express or implied to pay the balance claimed. *Treadway v. Ryan*, 3-437.

(*Code 1859, § 199.*) The officer in his return of an order of attachment, issued under § 199, must show that he has attached, not the property of A. B., or C. D., but of the defendant. *Repine v. McPherson*, 2-340.

Where an attachment is granted on an affidavit, in which the grounds mentioned in § 199 (code 1859) are positively stated, it is a ministerial and not a judicial act, and was properly authorized in § 200 (code 1859) to be done by the clerk of the district court, without conflicting with § 27 of the organic act. *Reyburn v. Brackett*, 2-227.

Affidavit which states "that affiant has reason to believe and does believe," is sufficient. *Campbell v. Hall, McC.*-53. *See off page*

Attachment levied on partnership cattle, void in this case. *Russell v. Smith*, 14-372.

Charge of fraudulent disposition of property not sustained in this case. *Robinson v. Melvin*, 14-484.

(4000) §191. **Attachment Affidavit.** An order of attach-

ment shall be made by the clerk of the court in which the action is brought, in any case mentioned in the preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing: *First*, The nature of the plaintiff's claim; *Second*, That it is just; *Third*, The amount which the affiant believes the plaintiff ought to recover; and, *Fourth*, The existence of some one of the grounds for an attachment enumerated in the preceding section.

If the claim was due when the action was brought, then the order of attachment ought to have been made by the clerk of the court in which the action was instituted, and not by the probate judge. *Buck v. Panabaker*, 32-468.

The code requires that the affidavit for attachment shall *show*, not that it shall *state*, that the plaintiff's claim is just. *Wilkins v. Tourtellott*, 28-833.

Attorney may make affidavit in attachment. *Baker v. Knickerbocker*, 25-290.

Unless the affidavit is filed by "the plaintiff, his agent or attorney," no order of attachment can rightfully issue. No presumption will relate back, and because a party is shown to be an agent when affidavit for publication is made, it will not be presumed that he was when the attachment was obtained. *Manley v. Headly*, 10-94.

(*L. 1865, p. 131*.) An original affidavit in attachment may be amended so as to state formally and definitely what is already stated therein inferentially and indefinitely. *Burton v. Robinson*, 5-287.

Where a party has assigned any portion of his property for the purpose of defrauding his creditors, such act will sustain an order of attachment issued against him on such grounds. *Johnson v. Laughlin*, 7-359.

Assignment in bankruptcy operates to dissolve only such attachments as were made within four months prior to the commencement of the bankruptcy proceedings, and only such as were levied upon property passing to the assignee, and does not dissolve attachments levied upon property remaining the bankrupt's. *Robinson v. Wilson*, 15-595.

Objection that the affidavit says, "One of the above-named debtors has absconded," etc., the statute reads, "*defendant* or one of several *defendants*." The point made by objection is too fine. *Ferguson v. Smith*, 10-406.

Affidavit which states, "that affiant has reason to believe, and does believe," is insufficient. *Campbell v. Hall, McC.*-53.

Where an attachment is granted on an affidavit in which the grounds mentioned in § 199, code 1859, are positively stated, it is a ministerial and not a judicial act, and was properly authorized in § 200, code 1859, to be done by the clerk of the district court without conflicting with § 27 of the organic act. *Reyburn v. Brackett*, 2-227.

Original affidavit is defective when it does not show, (1) whether claim is on tort or contract; (2) if on tort, when it does not show that the cause of action arose in this state; (3) when it does not state claim is just; (4) when it does not show amount plaintiff ought to recover.

Amended affidavit that does not relate back to time of original affidavit, is defective. *Robinson v. Burton*, 5-294.

(4001) **§ 192. Attachment; Bond.** The order of attachment shall not be issued by the clerk until an undertaking on the part of the plaintiff has been executed by one or more sufficient sureties, approved by the clerk, and filed in [his] office, in a sum not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained; but no undertaking shall be required where the party or parties defendant are all non-residents of the state or a foreign corporation. [L. 1870, ch. 87, § 5 (§ 192, as amended); took effect May 12, 1870.]

In ordinary cases of attachment a bond is never required, where the defendant is a non-resident, whatever the grounds for the attachment may be; and where the attachment is allowed to secure a claim not yet due, the bond is required only "as in case of an ordinary attachment." *Simon v. Stetter*, 25-158.

If the claim was due when the action was brought, then the order of attachment ought to have been made by the clerk of the court in which the action was instituted, and not by the probate judge. *Buck v. Panabaker*, 32-468.

No bond will required on a suit on note executed out of the state by a non-resident in favor of a non-resident. *Payne v. National Bank*, 16-147.

A resident of the state can become a non-resident only by leaving the state with the intention of becoming a non-resident. *Ballinger v. Lantier*, 15-610.

Non-resident defendants becoming residents, does not entitle them to have the attachment discharged, or an undertaking required from plaintiff. *Larimer v. Kelley*, 10-313.

Where an undertaking shows on the face that the sureties are residents of Chetopa, Labette county, and the affidavit of their justification shows that said sureties justified in the state of Kansas, Labette county, this is sufficient *prima facie* to show that the sureties reside in the state of Kansas. *Ferguson v. Smith*, 10-402.

(4002) **§ 193. Order; Contents.** The order of attachment shall be directed and delivered to the sheriff. It shall require him to attach the lands, tenements, goods, chattels, stocks, rights, credits, moneys and effects of the defendant in his county, not exempt by law from being applied to the payment of the plaintiff's claim, or so much thereof as will satisfy the plaintiff's claim, to be stated in the order as in the affidavit, and the probable costs of the action not exceeding fifty dollars.

Land held by equity title may be attached. *Bullene v. Hiatt*, 12-100.

A judgment debtor can be held as garnishee of the judgment creditor in favor of a creditor of the judgment creditor, where the two actions are in the same court. *Keith v. Harris*, 9-388.

(Code 1859, § 202.) The sheriff's return must show that he has attached the property of the defendant; not the property of A. B., or C. D., but of the defendant. *Repine v. McPherson*, 2-346.

(4003) § 194. **To Several Counties.** Orders of attachment may be issued to the sheriffs of different counties, and several of them may, at the option of the plaintiff, be issued at the same time, or in succession; but only such as have been executed shall be taxed in the costs, unless otherwise directed by the court.

(4004) § 195. **Returnable.** The return day of the order of attachment, when issued at the commencement of the action, shall be the same as that of the summons. When issued afterwards, it shall be twenty days after it issued.

Order of attachment issued at the commencement of an action, and made returnable in twenty days, is not therefore void if served in time. *Smith v. Payton*, 13-365.

EXECUTION AND RETURN THEREOF.

(4005) § 196. **Order Executed.** Where there are several orders of attachment against the same defendant, they shall be executed in the order in which they are received by the sheriff.

(4006) § 197. **Attachment; how Executed.** The order of attachment shall be executed by the sheriff, without delay. He shall go to the place where the defendant's property may be found, and declare that, by virtue of said order, he attaches said property at the suit of the plaintiff; and the officer, with two householders, who shall be first sworn or affirmed by the officer, shall make a true inventory and appraisement of all the property attached, which shall be signed by the officer and householders, and returned with the order.

(Code 1859, § 206.) The sheriff's return must show that he has attached the property of the defendant; not the property of A. B., or C. D., but of the defendant. *Repine v. McPherson*, 2-346.

(4007) § 198. **The Same.** When the property attached is real property, the officer shall leave with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order. Where it is personal property, and he can get possession, he shall take the same into his custody, and hold it subject to the order of the court.

(4008) § 199. **Possession; Property; Bond.** The sheriff shall deliver the property attached to the person in whose possession it was found, upon the execution, by such person, in

the presence of the sheriff, of an undertaking to the plaintiff, with one or more sufficient sureties, resident in the county, to the effect that the parties to the same are bound, in double the appraised value thereof, that the property, or its appraised value in money, shall be forthcoming to answer the judgment of the court in the action; but if it shall appear to the court that any part of said property has been lost or destroyed by unavoidable accident, the value thereof shall be remitted to the person so bound.

Where property is attached in the hands of a third person, and such third person, together with the defendant in the action, gives a forthcoming bond to the plaintiff for the property, under § 199: *Held*, That such third person is not estopped from afterward claiming the property as his own, unless the property has been delivered to such third person or to the defendant by the officer, in pursuance of such forthcoming bond. *Case v. Shultz*, 31-96.

Again, in attachment actions, the statute provides for two bonds—one a forthcoming bond, and another to discharge the attachment. (Civil code, §§ 199, 213.) Now the forthcoming bond is in its nature very like the *replevin* bond. In each case it is a bond in lieu of the property. * * * So that it would seem that it is generally true that, where the property is held by a party, under a bond given in an action, and conditioned for the redelivery of the specific property, it is to be considered in *custodia legis*, the same as if the actual possession was with the officer. (22-322.) *McKinney v. Purcell*, 28-451.

A forthcoming bond in attachment, running to the officer and not to the plaintiff in the attachment, is valid. *Johnson v. Weatherwax*, 9-75.

In an action on an undertaking given by the defendant in an attachment case, to secure the release of the attached property, it is necessary to aver and show by the evidence that the attached property was restored to the defendant, or there can be no recovery on the undertaking. *McGonigle v. Gordon*, 11-167.

(4009) **§ 200. Garnishment.** When the plaintiff, his agent or attorney, shall make oath, in writing, that he has good reason to, and does, believe that any person or corporation, to be named, has property of the defendant (describing the same) in his possession, or is indebted to him, he shall leave with such garnishee a copy of the order of attachment, with a written notice that he appear and answer, as provided herein.

(*Laws 1868, ch. 111, § 1.*) That the earnings of a debtor who is a resident of this state for his personal services at any time within three months next preceding the issuing of an execution, or attachment, or garnishment process, cannot be applied to the payment of his debts when it is made to appear by the debtor's affidavit or otherwise that such earnings are necessary for the maintenance of a family supported wholly or partly by his labor. The filing of the affidavit by the debtor or making proof as above provided shall be

conclusive, and it shall be the duty of the court in which such proceeding is pending to release all moneys held by such attachment or garnishee process immediately upon the filing of such affidavit or the making of such proof.

Attorney may make affidavit in garnishment. *Baker v. Knickerbocker*, 25-290.

Refusal of partner to disclose to sheriff interest he has in property, about to be levied on under attachment against other partner, does not authorize sheriff to take them from the custody of party so refusing. There is ample remedy by garnishment. *Russell v. Smith*, 14-374.

A judgment debtor may be held as garnishee of the judgment creditor in favor of a creditor of the judgment creditor, where the two actions are in the same court. *Keith v. Harris*, 9-386.

(4010) **§201. Garnishee Service.** The copy of the order and notice shall be served upon the garnishee, as follows: If he be a person, they shall be served upon him personally, or left at his usual place of residence; if a corporation, they shall be left with the president or other head of the same, or the secretary, cashier or managing agent thereof.

(4011) **§202. Interrogatories; Garnishment.** If the garnishee do not reside in the county in which action is brought, the plaintiff shall prepare written interrogatories, to be answered by the garnishee, a copy of which shall be served in the same manner as the order and notice.

(4012) **§203. Different Attachments.** Different attachments of the same property may be made by the same officer, and one inventory and appraisement shall be sufficient; and it shall not be necessary to return the same with more than one order.

(4013) **§204. Subsequent Attachments.** Where property is under attachment, it shall be attached under subsequent orders, as follows: *First*, If it be real property, it shall be attached in the manner prescribed in section one hundred and ninety-eight. *Second*, If it be personal property, it shall be attached as in the hands of the officer, and subject to any previous attachment. *Third*, If the same person or corporation be made a garnishee, a copy of the order and notice shall be left with him in the manner prescribed in section two hundred and one.

(4014) **§205. Officer's Return.** The officer shall return, upon every order of attachment, what he has done under it. The return must show the property attached, and the time it was attached; when garnishees are served, their names, and the time each was served, must be stated. The officer shall also return with the order all undertakings given under it.

(Code 1859, § 213.) The return of the sheriff must show that he has attached the property of the defendant; not the property of A. B., or C. D., but of the defendant. *Repine v. McPherson*, 2-346.

(4015) **§ 206. Time Property and Garnishee Bound.** An order of attachment binds the property attached from the time of service, and the garnishee shall stand liable to the plaintiff in attachment for all property, moneys and credits in his hands, or due from him to the defendant, from the time he is served with the written notice mentioned in section two hundred and one; but where property is attached in the hands of a bailee, his lien thereon shall not be affected by the attachment.

The garnishment lien attaches when the garnishee is served with notice of garnishment. *Fullam v. Abrahams*, 29-727.

The garnishment lien attaches when the garnishee is served with notice, and continues until the attachment is dissolved, or the plaintiff's claim is satisfied; and there is no provision for the determination of the extent, force, validity or priority of this kind of lien, in an action to foreclose a mechanic's lien. Indeed, the garnishee in such a case would have no adequate remedy except by the action of interpleader, and hence in such a case the action would lie. *Board v. Scoville*, 13-29.

The attachment binds the interest of the debtor from the time the attachment is levied. *Bullene v. Hiatt*, 12-101.

A judgment debtor can be held as garnishee of the judgment creditor in favor of a creditor of the judgment creditor, where the two actions are in the same court. *Keith v. Harris*, 9-388.

DISPOSITION OF ATTACHED PROPERTY.

(4016) **§ 207. Receiver; Bond.** The court, or any judge thereof, during vacation, may, on application of the plaintiff, and on good cause shown, appoint a receiver, who shall take an oath faithfully to discharge his duty, and shall give an undertaking to the state of Kansas, in such sum as the court or judge may direct, and with such security as shall be approved by the clerk of such court, for the faithful performance of his duty as such receiver, and to pay over all money and account for all property which may come into his hands by virtue of his appointment, at such times and in such manner as the court may direct.

(4017) **§ 208. Receiver; Duties, etc.** Such receiver shall take possession of all notes, due bills, books of account, accounts and all other evidences of debt that have been taken, by the sheriff or other officer, as the property of the defendant in attachment, and shall proceed to settle and collect the same. For that purpose, he may commence and maintain actions in his own name as such receiver; but in such actions, no right of defense shall be impaired or affected.

(4018) **§ 209. Notice of Appointment; Receiver.** Such receiver shall forthwith give notice of his appointment to the persons indebted to the defendant in attachment. The notice shall be written or printed, and shall be served on the debtor or debtors, by copy personally, or by copy left at the residence of the debtor or debtors; and from the date of such service, the debtors shall stand liable to the plaintiff in attachment for the amount of moneys or credits in their hands, or due from them to the defendant in attachment, and shall account therefor to the receiver.

(4019) **§ 210. Receiver; Report.** Such receiver shall, when required, report his proceedings to the court, and hold all moneys collected by him, and the property which may come into his hands, subject to the order of the court.

(4020) **§ 211. Sheriff to Act as Receiver.** Where a receiver is not appointed by the court or a judge thereof, as provided in section two hundred and seven, the sheriff or other officer attaching the property, shall have all the powers and perform all the duties of a receiver appointed by the court or a judge, and may, if necessary, commence and maintain actions in his own name as such officer. He may be required to give security other than his official undertaking.

(4021) **§ 212. Orders Concerning Property.** The court shall make proper orders for the preservation of the property during the pendency of the suit; it may direct a sale of property, when, because of its perishable nature, or of the costs of keeping it, a sale will be for the benefit of the parties. In vacation, such sale may be ordered by the judge of the court. The sale shall be public, after such advertisement as is prescribed for the sale of like property on execution, and shall be made in such manner and upon such terms of credit, with security, as the court or judge, having regard to the probable duration of the action, may direct. The proceeds, if collected by the sheriff, with all the money received by him from garnishees, shall be held and paid over by him, under the same requirement and responsibility of himself and sureties, as are provided in respect to money deposited in lieu of bail.

(INTERPLEA—see § 45a.)

PROCEEDINGS UPON ATTACHMENT.

(4022) **§ 213. Bond to Discharge Attachment.** If the defendant, or other person on his behalf, at any time before judgment, cause an undertaking to be executed to the plaintiff, by one or more sureties, resident in the county, to be approved

by the court, in double the amount of the plaintiff's claim, as stated in his affidavit, to the effect that the defendant shall perform the judgment of the court, the attachment in such action shall be discharged, and restitution made of any property taken under it or the proceeds thereof. Such undertaking shall, also, discharge the liability of a garnishee in such action, for any property of the defendant in his hands.

Again, in attachment actions the statute provides for two bonds—one a forthcoming bond, and another to discharge the attachment. (Civil code, §§ 199-213.) Now the forthcoming bond is in its nature very like the replevin bond. In each case it is a bond in lieu of the property. * * So that it would seem that it is generally true that, where the property is held by a party, under a bond given in an action, and conditioned for the redelivery of the specific property, it is to be considered in *custodia legis*, the same as if the actual possession was with the officer. (22-322.) *McKinney v. Purcell*, 28-452.

In addition to the right of the defendant to have an excessive levy under an attachment set aside, where property is taken in excess of the claim or damages alleged, he can obtain the discharge of all the property attached by the execution of an undertaking to the plaintiff, with sufficient sureties, in double the amount of the plaintiff's claim, conditioned that the defendant shall perform the judgment of the court. *Tucker v. Green*, 27-358.

This action was upon the bond. It must stand upon the bond, or not at all. The sole object for giving the bond failed, as the property was not restored. Therefore no recovery can be had upon it. (11-167.) *Eddy v. Moore*, 23-114.

Where the defendant in attachment appeals from a justice's court, the attachment is thereby discharged, and the property should be delivered to the defendant. *St. J. & D. C. R. R. v. Casey*, 14-506.

In an action on an undertaking given by the defendant in an attachment case, to secure the release of the attached property, it is necessary to aver, and show by the evidence that the attached property was restored to the defendant, or there can be no recovery on the undertaking. *McGonigle v. Gordon*, 11-174.

(4023) **§ 214. Bond Discharging; Vacation.** The undertaking mentioned in the last section may, in vacation, be executed in the presence of the sheriff having the order of attachment in his hands, or after the return of the order, before the clerk, with the same effect as if executed in court, the sureties in either case to be approved by the officer before whom the undertaking is executed.

(4024) **§ 215. Answer of Garnishee; Time.** The garnishee shall answer as follows: If the order of attachment be returned during a term of the court, and ten days before the close thereof, he shall answer at that term, on a day to be

named in the notice, not less than ten days from the date of service. If the order be returned during vacation, he shall answer on the first day of the next term after its return. If the garnishee reside out of the county in which the action is brought, he shall file written answers to the interrogatories served upon him within the time hereinbefore provided, which answer shall be sworn to, subscribed and certified in the same manner as an affidavit. If he reside in the county in which the action is brought, he shall appear in court and be examined. A garnishee shall answer, under oath, all questions or interrogatories put to him touching the property, of every description, of the defendant, in his possession or under his control, and shall disclose truly the amount owing by him to the defendant, at or after the service of notice, whether due or not; and in case of a corporation, any stock therein held by or for the benefit of the defendant, at or after the service of notice.

A judgment debtor can be held as garnishee of the judgment creditor in favor of a creditor of the judgment creditor, where the two actions are in the same court. *Keith v. Harris*, 9-388.

The plaintiff cannot introduce any other evidence under this section than the answer of the garnishee, except by the consent of parties. *Case v. Ingersoll*, 7-371.

(4025) **§215a. Answer of Corporation.** When any corporation shall be notified to appear and answer as garnishee of any defendant, pursuant to sections 200, 201 and 202, of said chapter 80, the answer, required to be made by such garnishee by section 215 of said chapter, shall not be required in any case in less than fifteen days from the service of the order and notice, and interrogatories, if any; and when neither the president or other head of such corporation, nor the secretary, cashier, or managing agent thereof, shall reside or live, or keep his office or place of business in the county where the action is pending, the answer of such garnishee shall not be required in less than thirty days from the service of the order and notice, and interrogatories, if any. [L. 1870, ch. 87, § 6; took effect May 12, 1870.]

(4026) **§216. Garnishee Pay Money into Court.** A garnishee may pay the money owing to the defendant by him to the sheriff having the order of attachment, or into court. He shall be discharged from liability to the defendant for any money so paid, not exceeding the plaintiff's claim. He shall not be subject to costs, beyond those caused by his resistance of the claim against him; and if he disclose the property in his hands, or the true amount owing by him, and deliver and pay

the same, according to the order of the court, he shall be allowed his costs.

(4027) § 217. **Failure to Answer.** If the garnishee do not answer, as required by section two hundred and fifteen, the court may proceed against him by attachment, as for a contempt.

(4028) § 218. **Possession; Delivery; Payment.** If the garnishee answer, and it is discovered, on his examination, that, at or after the service of the order of attachment and notice upon him, he was possessed of any property of the defendant, or was indebted to him, the court may order the delivery of such property and payment of the amount owing by the garnishee into the court; or the court may permit the garnishee to retain the property or the amount owing, upon the execution of an undertaking to the plaintiff, by one or more sufficient sureties, to the effect that the amount shall be paid or the property forthcoming, as the court may direct.

The plaintiff cannot introduce any other evidence under this section than the answer of the garnishee, except by the consent of parties. *Case v. Ingersoll*, 7-371.

(4029) § 219. **Action against Garnishee.** If the garnishee fail to answer, or if he answer and his disclosure is not satisfactory to the plaintiff, or if he fail to comply with the order of the court to deliver the property and pay the money owing into court, or give the undertaking required in the preceding section, the plaintiff may proceed against him in an action, by filing a petition, in his own name, as in other cases, and causing a summons to be issued upon it; and thereupon such proceedings may be had as in other actions, and judgment may be rendered in favor of the plaintiff, for the amount of property, and credits of every kind, of the defendant, in the possession of the garnishee, and for what shall appear to be owing by him to the defendant, and for the costs of the proceedings against the garnishee. If the plaintiff proceed against the garnishee by action, for the cause that his disclosure was unsatisfactory, unless it appear in the action that such disclosure was incomplete, the plaintiff shall pay the costs of such action. The judgment in this action may be enforced as judgments in other cases. When the claims of plaintiffs in attachment are satisfied, the defendant in attachment may, on motion, be substituted as the plaintiff in this judgment.

The only remedy, if the answer of the garnishee under §§ 215 and 218 is unsatisfactory, is to sue the garnishee. *Case v. Ingersoll*, 7-372.

(4030) § 220. **Final Judgment.** Final judgment shall not

be rendered against the garnishee until the action against the defendant in attachment has been determined; and if, in such action, judgment be rendered for the defendant in attachment, the garnishee shall be discharged and recover costs. If the plaintiff shall recover against the defendant in attachment, and the garnishee shall deliver up all the property, moneys and credits of the defendant in his possession, and pay all the moneys from him due, as the court may order, the garnishee shall be discharged, and the costs of the proceedings against him shall be paid out of the property and moneys so surrendered, or as the court may think right and proper; and on final judgment against the garnishee, execution may be issued as in other cases.

(4031) **§ 221. Discharge of Attachment.** If judgment be rendered in the action for the defendant, the attachment shall be discharged, and the property attached, or its proceeds, shall be returned to him.

(4032) **§ 222. Judgment, How Satisfied.** If judgment be rendered for the plaintiff, it shall be satisfied as follows: So much of the property remaining in the hands of the officer, after applying the moneys arising from the sale of perishable property, and so much of the personal property and lands and tenements, if any, whether held by legal or equitable title, as may be necessary to satisfy the judgment, shall be sold by order of the court, under the same restrictions and regulations as if the same had been levied on by execution; and the money arising therefrom, with the amount which may be recovered from the garnishee, shall be applied to satisfy the judgment and costs. If there be not enough to satisfy the same, the judgment shall stand, and execution may issue thereon for the residue, in all respects as in other cases. Any surplus of the attached property or its proceeds shall be returned to the defendant.

After the rendition of the judgment for plaintiff, an order for the sale of the attached property was properly made. *Hummer v. Lamphear*, 32-445.

Where the attachment was levied on a quarter-section of land, which tract was appraised as a whole, and on process thereafter for the collection of the judgment for costs one-quarter of said quarter-section was levied upon and separately appraised and sold, said last-mentioned tract being amply sufficient to satisfy such judgment: *Held*, That neither the failure to sell the entire tract taken on the attachment order, nor the subsequent appraisal of the one-fourth part by itself, nor the sale conformably to such last appraisal, was a defect which could be taken advantage of in a collateral attack. *Merwin v. Hawker*, 31-222.

Would a simple money judgment, unaccompanied by any order for the sale of the attached property, be a nullity? We think not. The attachment is but an ancillary proceeding. If the defendant be served with process, action may go on to judgment whether the attachment stand or fall. The allegations in the affidavit for attachment present none of the issues of the case. The affidavit itself is no pleading. The order of sale is technically no part of the judgment. The code provides that if judgment be rendered for the plaintiff, it shall be satisfied by a sale of the property under the order of the court. *Rapp v. Kyle*, 26-92.

As the proceedings to enforce the lien for rent by action and attachment are the same as in other actions of attachment, the costs followed the judgment, and no error was committed in ordering the proceeds of the attached property to be applied to satisfy the costs as well as the judgment. *Conwell v. Kuykendall*, 29-709.

The objection to the petition is fatal to the judgment in this: That while it is fully alleged that H. and O. recovered a judgment against S., and that the defendants failed to return the wheat described in the forthcoming bond, it nowhere states that the court made any order to sell the attached property. Until such order was made, the parties executing the bond were not required to deliver the attached property to the sheriff, nor to any other party. *Fisher v. Haxtun*, 26-156.

(4033) **§ 223. Delivery of Attached Property.** The court may compel the delivery to the sheriff, for sale, of any of the attached property for which an undertaking may have been given, and may proceed summarily, on such undertaking, to enforce the delivery of the property, or the payment of such sum as may be due upon the undertaking, by rules and attachments, as in cases of contempt.

In 24 Kas. 580, we held that the execution of a forthcoming bond does not operate as a release of the attachment lien; that the object of the bond is to insure the safe keeping and faithful return of the property to the officer, if its return shall be required. Now such a return is not required, unless the court shall order the property, or a part thereof, to be sold to satisfy the judgment. In the absence of any allegation, in a petition upon a forthcoming bond, of any order for the sale or return of the attached property, no recovery can be had. *Fisher v. Haxtun*, 26-157.

(4034) **§ 224. Possession by Sheriff.** The court may order the sheriff to repossess himself, for the purpose of selling it, of any of the attached property, which may have passed out of his hands, without having been sold or converted into money; and the sheriff shall, under such order, have the same power to take the property as he would have under an order of attachment.

(4035) **§ 225. Reference for Priority.** Where several attachments are executed upon the same property, or the same

persons are made garnishees, the court, on motion of any of the plaintiffs, may order a reference, to ascertain and report the amounts and priorities of the several attachments, or may determine any such amount and priorities without such reference.

GENERAL PROVISIONS.

(4086) **§226. Death of Defendant.** From the time of the issuing of the order of attachment, the court shall be deemed to have acquired jurisdiction and to have control of all subsequent proceedings under the attachment; and if, after the issuing of the order, the defendant, being a person, should die, or a corporation, and its charter should expire by limitation, forfeiture or otherwise, the proceedings shall be carried on; but in all such cases, other than where the defendant was a foreign corporation, his legal representatives shall be made parties to the action.

Now, if the attachment was properly issued, and the officer in fact took possession of the property, we are inclined to think that the failure to leave with the occupant or on the place a copy of the order, is a mere irregularity, and not a fatal defect. At any rate, if the officer did in fact so leave the order, the return may be so amended as to state the fact, and thus all question removed as to the regularity of service. *Wilkins v. Tourtelott*, 28-835.

(4087) **§227. Additional Security.** The defendant may, at any time before judgment, after reasonable notice to the plaintiff, move the court for additional security on the part of the plaintiff; and if, on such motion, the court is satisfied that the surety in the plaintiff's undertaking has removed from this state, or is not sufficient for the amount thereof, it may vacate the order of attachment and direct restitution of any property taken under it, unless, in a reasonable time, to be fixed by the court, sufficient security be given by the plaintiff.

(4088) **§228. Motion to Discharge Attachment.** The defendant may, at any time before judgment, upon reasonable notice to the plaintiff, move to discharge an attachment, as to the whole or part of the property attached.

Where, upon a motion to discharge an attachment, affidavits are read and oral evidence is submitted tending to prove all the facts necessary to sustain the attachment, and thereupon the court refuses to grant such motion, a reviewing court will not disturb such ruling. *Urquhart v. Smith*, 5-447.

The statute authorizing the discharge of attachments does not create any limitation upon the reasons or grounds for the discharge of attachments, or intimate that there is any such limitation. *Rullman v. Hulse*, 33-671.

This section authorizes the defendant at any time before judgment, upon reasonable notice to the plaintiff, to move discharge of an attachment as to the whole or part of the property attached. Under this section, the defendant may make his application for a discharge or a dissolution of the attachment as soon as reasonable notice thereof can be given to the plaintiff. *Quinlan v. Danford*, 28-510.

The decision of a motion made before a justice of the peace, to discharge from seizure certain property taken on attachment, on the ground that it is exempt, is not conclusive, and the question of exemption may be tried thereafter in an action of replevin brought by the judgment debtor. *Watson v. Jackson*, 24-442.

When a motion to dissolve an attachment is made before the judge at chambers, it is not necessary that the motion be first filed with the clerk of the court. When an order of the district judge at chambers sustaining or dissolving an attachment is made, it, together with the motion, is then filed with the clerk of the court, and becomes a part of the record. *Gillespie v. Lovell*, 7-419.

When a defendant files affidavits in support of his motion to dissolve an order of attachment, it is not error to permit the plaintiff to file affidavits in support of, and tending to establish the truth of the grounds upon which such order of attachment was issued. An affidavit to procure an attachment is not a pleading, and agents or attorneys making the same do not have to state why party himself did not verify it. *Johnson v. Laughlin*, 7-359.

(4039) **§ 229. Plaintiff May Oppose.** If the motion be made upon affidavits, on the part of the defendant, or papers and evidence in the case, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to that on which the order of attachment was made.

While affidavits are ordinarily the only testimony received upon motions, we suppose it is competent for the court, in its discretion and in furtherance of justice, to call the witnesses before it and have them examined and cross-examined orally in its presence. *Tyler v. Safford*, 24-582.

ATTACHMENTS IN CERTAIN ACTIONS.

(4040) **§ 230. Debt not Due.** Where a debtor has sold, conveyed or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts, or is about to make such sale or conveyance or disposition of his property, with such fraudulent intent, or is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering or delaying them in the collection of their debts, a creditor may bring an action on his claim before it is due, and have an attachment against the property of the debtor.

A motion to dissolve attachment may be made, if the attachment is under § 230, and has not been granted by the court or judge. *Rullman v. Hulsee*, 33-671.

This section does not apply to actions brought before justices of the peace. *Lyons v. Insley*, 32-176.

A probate judge can only grant an order of attachment when the district judge is absent from his county, upon the grounds mentioned in § 230. *Buck v. Panabaker*, 32-467.

Attachment under this section; suit against sheriff for wrongful seizure and oppression; evidence of care. *Dow v. Julian*, 32-577.

Attachment under this section is improperly issued to another county, unless the court in which suit has been brought has jurisdiction of one of the parties to suit; and where an action was brought on a debt not due, and attachment only as to party out of the county and not as to the other joint obligor served in the county, *held*, that the attachment was improperly issued. *Rullman v. Hulsee*, 32-598.

Whether said § 230 of the civil code has any application to cases brought before a justice of the peace, is also at least doubtful. *Connelly v. Woods*, 31-363.

Action and attachment on note before due; attachment sustained by evidence. *Curtis v. Hoadley*, 29-567.

Action under § 230, and then attempt made to change it so as to bring it under § 190. In an application for an order of attachment under § 230 *et seq.* of the civil code, before the claim is due, if the order of attachment is not granted, then the action must be dismissed, and if the order of attachment is granted, but should afterwards be set aside, for the reason that the grounds therefor were not true, then the action should also be dismissed. *Pierce v. Myers*, 28-369.

Where the aggregate indebtedness was more than equal to the value of all his property which was not exempt from execution, under such circumstances, he undoubtedly had a right to make an assignment for the benefit of his creditors. * * * If the defendant acted in good faith in making the assignment, it is immaterial in this case whether he accomplished it or not. *Harris v. Cappell*, 28-120.

(4041) **§ 231. Who May Grant.** The attachment authorized by the last section may be granted by the court in which the action is brought, or by the judge thereof, or, in his absence from the county, by the probate judge of the county in which the action is brought; but before such action shall be brought, or such attachment shall be granted, the plaintiff, or his agent or attorney, shall make an oath in writing, showing the nature and amount of the plaintiff's claim, that it is just, when the same will become due, and the existence of some one of the grounds for attachment enumerated in the preceding section. [L. 1883, ch. 122, § 1 (§ 231, as amended); took effect April 5, 1883.]

This section does not apply to actions brought before justices of the peace. *Lyons v. Insley*, 32-176.

The statute does not authorize a probate judge to grant an attachment, on the ground that a defendant has fraudulently contracted the debt, or fraudulently incurred the liability or obligation for which suit has been brought. *Buck v. Panabaker*, 32-467.

Attorney may make affidavit in attachment on claims not due. *Baker v. Knickerbocker*, 25-190.

Affidavit for attachment made before the clerk of the court, and signed "W. W. C., Clerk," without giving title to his office in full, and without putting the seal of the court to the paper, does not render the attachment void. *Simon v. Stetter*, 25-155.

(4042) **§ 232. Attachment Refused; Action Dismissed.** If the court or judge refuse to grant an order of attachment, the action shall be dismissed, but without prejudice to a future action; and in all such actions, application for an attachment must be made.

(4043) **§ 233. Order Allowing Attachment.** The order of the court or judge granting the attachment shall specify the amount for which it is allowed, not exceeding a sum sufficient to satisfy the plaintiff's claim, and the probable costs of the action.

(4044) **§ 234. Bond for Attachment.** The order of attachment, as granted by the court or judge, shall not be issued by the clerk until there has been executed, in his office, an undertaking, on the part of the plaintiff, as in case of any ordinary attachment.

In ordinary cases of attachment a bond is never required where the defendant is a non-resident, whatever the grounds for the attachment may be, and where the attachment is allowed to secure a claim not yet due, the bond is required only as in case of an ordinary attachment. *Simon v. Stetter*, 25-158.

(4045) **§ 235. No Judgment till Claim Due.** The plaintiff in such action shall not have judgment on his claim before it is due, but the proceedings on the attachment may be conducted without delay.

As § 27, ch. 55, Laws 1879, authorizes the commencement of proceedings where the crop is being removed from the leased premises, whether the rent be due or not, the action clearly was not prematurely commenced, and as the judgment was not rendered until after the notes had become due and payable, no error prejudicial to any party is perceptible. The judgment was not rendered until after the claim was due. *Neifert v. Ames*, 28-517.

(4046) **§ 236. Proceedings, How Regulated.** The proceedings applicable to attachments issued by the clerk in ordi-

nary cases, shall regulate the attachment granted by the court or judge, as far as applicable.

ARTICLE 12—INJUNCTION.

SEC.

- 237. Injunction, what is, and when allowed.
- 238. May be granted, for what causes.
- 239. When and by whom.
- 240. Notice of time of hearing to be given.
- 241. Party may be restrained until application decided.
- 242. Bond to be executed.
- 243. Contents of order, and its service.
- 244. The same.
- 245. Injunction operates, when.
- 246. Application for, not to be granted by judge or court of inferior jurisdiction, when.

SEC.

- 247. How enforced; disobedience, how punished.
- 248. Party enjoined may move for additional security.
- 249. Affidavits may be read.
- 250. Motion to vacate or modify injunction.
- 251. Plaintiff may oppose by affidavits.
- 252. Defendant may obtain injunction upon an answer.
- 253. Injunction to enjoin illegal levy of tax, nuisance, etc.

(4047) **§237. Injunction Defined.** The injunction provided by this code is a command to refrain from a particular act. It may be the final judgment in an action, or may be allowed as a provisional remedy, and, when so allowed, it shall be by order. The writ of injunction is abolished.

The order for delivery under §176 is ancillary. It is like an order of injunction, which may be the final judgment or a provisional remedy. *Bachelor v. Walburn*, 23-736.

In an action for alimony, the court may restrain by injunction the disposition of the husband's property pending the litigation. *Jenness v. Cutler*, 12-517.

(4048) **§238. Cause for Injunction.** When it appears, by the petition, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And when, during the pendency of an action, it shall appear, by affidavit, that the defendant threatens or is about to remove

or dispose of his property with intent to defraud his creditors, or to render the judgment ineffectual, a temporary injunction may be granted to restrain such removal or disposition. It may, also, be granted in any case where it is specially authorized by statute.

Clerk and treasurer *de facto* hired school teacher. The director and the claimant of treasurer's office hired another, and the claimant of treasurer's office who was not in possession brought suit of *quo warranto* to obtain possession of the office. Pending said action of *quo warranto*, an injunction will be granted to restrain the director and the two others acting with him from interfering with said school. *Brady v. Sweetland*, 13-41.

Judgment in this case not enjoined on account of laches and negligence of judgment debtor. *Tutt v. Ferguson*, 13-45.

Affidavits presented by defendants on hearing of application for temporary injunction, rebutting the allegations of the petitioner, no injunction ought to be allowed. *A. & N. R. R. v. Troy*, 10-513.

Temporary restraining order to prevent cutting down of telegraph poles, until it is shown whether or not plaintiff had the right of way, should have been continued. *St. J. & D. C. R. R. v. Dryden*, 11-186.

Injunction granted in favor of lot owner abutting on court-house square, preventing sale of any part of the square. *Commissioners v. Lathrop*, 9-459.

A judgment debtor may be held as garnishee of the judgment creditor in favor of a creditor of the judgment creditor, where the two actions are in the same court. And in such a case injunction will lie in favor of the judgment debtor, to restrain the collection of the judgment pending the garnishment proceedings. *Keith v. Harris*, 9-386.

Injunction will not lie to restrain the commission of a pure, simple and naked trespass. *Gulf R. R. v. Wheaton*, 7-232.

Party holding state bond which may be impaired, may enjoin illegal use of sinking fund. *Graham v. Horton*, 6-343.

A person against whom no illegal tax has been assessed or levied cannot, by injunction, restrain the collection of an illegal tax against another person. *Gulf R. R. v. Wheaton*, 7-232.

Party borrowing money from bank, on a loan prohibited by law, may not retain the money and at same time enjoin the bank from negotiating the securities. *Elder v. Bank*, 12-238.

Where, after county-seat election, and mandamus proceedings are pending to compel certain officers to remove to new county seat, and such judgment is brought to supreme court and affirmed, and while such proceedings are pending a new election is held and the other place receives a majority of the votes: *Held*, An injunction to restrain the execution of the judgment will be allowed. *Scott v. Paulen*, 15-162.

Improper use of school house may be enjoined. *Spencer v. School District*, 15-259.

Injunction refused to restrain officer from selling property under execution in this case. *Jaedicke v. Patrie*, 15-287.

Preliminary injunction is not a matter of strict right. Its issue rests with the sound discretion of the judge. *Olmstead v. Koester*, 14-463.

A temporary injunction to restrain county and state treasurer from paying interest on railroad bonds does not authorize injunction in behalf of railroad to enjoin tax to pay interest on said bonds. *L. L. & G. R. R. v. Clemmans*, 14-82.

Judges have considerable discretion in granting or refusing temporary injunction. *Wood v. Millsbaugh*, 15-14.

Preliminary injunction refused, to restrain enforcement of judgment of removal of mill-dam—party obtaining decree being able to pay damages—the question having been litigated as to dam being nuisance. *Akin v. Davis*, 14-143.

On application for temporary injunction, where notice has been given to the defendant, he may, before answer filed, introduce any legal evidence to show that the injunction should not be granted. *Stoddart v. Vanlaningham*, 14-18.

It is often the duty of the court to refuse a preliminary injunction, if it appear doubtful what may be the facts established on the final hearing, and the right of the plaintiff is not likely to suffer serious injury unless immediately enforced. *Conley v. Flening*, 14-381.

Injunction refused landlord, in effort to restrain unauthorized use of premises, by party in possession. Careful reflection convinces us that equity will be permitted to interfere to restrain a use, if at all, only when the use is illegal. *Bodwell v. Crawford*, 26-295.

One of the most essential prerequisites for a final injunction is, that all persons interested in the subject-matter and result should be made parties. *State v. Anderson*, 5-114.

The defendant has no right to erect and maintain a building on land owned and in the actual possession of plaintiff, and the erection of such building is a trespass of a character to authorize equitable relief. (25-67; 23-637.) *Long v. Kasebeer*, 28-239.

(4049) § 239. When and by Whom Injunction Granted.
The injunction may be granted at the time of commencing the action, or any time afterwards, before judgment, by the district court, or the judge thereof, or, in his absence from the county, by the probate judge, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto.

Attorney may make affidavit for injunction. *Baker v. Knickerbocker*, 25-290.

When a petition is also used as an affidavit, and as evidence in an injunction suit, it must state the facts with all that fullness of detail required in affidavits and depositions. (4-124.) *Center Township v. Hunt*, 16-437.

Refusal of a preliminary injunction, restraining sheriff from destroying dam in pursuance of a decree, not error, though plaintiff in the injunction suit was not a party to decree. *Akin v. Davis*, 14-143.

Judge at chambers may try for contempt. *State v. Cutler*, 13-134.

District judge may be absent from his county even while his term of court is adjourned over for a day, and the term may still be a continuous one. *State v. Montgomery*, 8-359.

Verified petition, in this case, not sufficient to be read as an affidavit. The legal requirements of an affidavit defined. *Atchison v. Bartholow*, 4-138.

(4050) **§ 240. Notice for Injunction.** If the court or judge deem it proper that the defendant, or any party to the suit, should be heard before granting the injunction, it may direct a reasonable notice to be given to such party to attend for such purpose, at a specified time and place, and may, in the meantime, restrain such party.

(4051) **§ 241. Restraining Order.** An injunction shall not be granted against a party who has answered, unless upon notice; but such party may be restrained until the decision of the application for an injunction.

(4052) **§ 242. Bond for Injunction.** No injunction, unless otherwise provided by special statute, shall operate, until the party obtaining the same shall give an undertaking, executed by one or more sufficient securities, to be approved by the clerk of the court granting such injunction, in an amount to be fixed by the court or judge allowing the same, to secure to the party injured the damages he may sustain, if it be finally decided that the injunction ought not to have been granted.

Suit will not lie on this bond, even after dissolution of injunction, until after final trial and judgment in the suit. *Brown v. Galena Mining Co.*, 32-530.

A judgment adverse to the plaintiff, on the merits of the action, is a final decision that the injunction ought not to have been granted; and whether a formal order dissolving it be entered or not, a right of action accrues on the bond. *Fox v. Hudson*, 20-249.

(4053) **§ 243. Order and Service of Injunction.** The order of injunction shall be addressed to the party enjoined, shall state the injunction, and shall be issued by the clerk. Where the injunction is allowed at the commencement of the action, the clerk shall indorse upon the summons "Injunction allowed," and it shall not be necessary to issue the order of injunction, nor shall it be necessary to issue the same where notice of the application therefor has been given to the party enjoined. The service of the summons so indorsed, or the notice of an application for an injunction, shall be notice of its allowance.

(4054) **§ 244. Service; Injunction.** Where the injunction is allowed during the litigation, and without notice of the ap-

plication therefor, the order of injunction shall be issued, and the sheriff shall forthwith serve the same upon each party enjoined, in the manner prescribed for serving a summons, and make return thereof without delay.

(4055) **§ 245. Injunction Binding.** An injunction binds the party from the time he has notice thereof, and the undertaking required by the applicant therefor is executed.

(4056) **§ 246. When Not Granted.** No injunction shall be granted by a judge, after a motion therefor has been overruled on the merits of the application, by his court; and where it has been refused by the court in which the action is brought, or a judge thereof, it shall not be granted to the same applicant, by a court of inferior jurisdiction, or any judge thereof.

(4057) **§ 247. Disobedience of Injunction.** An injunction granted by a judge, may be enforced as the act of the court. Disobedience of any injunction may be punished as a contempt, by the court or any judge who might have granted it in vacation. An attachment may be issued by the court or judge, upon being satisfied, by affidavit, of the breach of the injunction, against the party guilty of the same, and he may be required, in the discretion of the court or judge, to pay a fine not exceeding two hundred dollars, for the use of the county, to make immediate restitution to the party injured, and give further security to obey the injunction; or, in default thereof, he may be committed to close custody, until he shall fully comply with such requirements, or be otherwise legally discharged.

The proceeding for the violation of an injunction is a summary proceeding, and the charge may be tried upon the original affidavit filed in such proceeding, and not upon any formal pleadings. *State v. Graham, 13-136.*

Quære: Is a party entitled to a jury? *State v. Graham, 13-136.*

(4058) **§ 248. Additional Security.** A party enjoined may, at any time before judgment, upon reasonable notice to the party who has obtained the injunction, move the court for additional security; and if it appear that the surety in the undertaking has removed from the state, or is insufficient, the court may vacate the injunction, unless, in a reasonable time, sufficient security is given.

(4059) **§ 249. Evidence; Affidavits.** On the hearing of an application for an injunction, each party may read affidavits. All affidavits shall be filed.

(4060) **§ 250. Motion to Vacate or Modify.** If the injunction be granted without notice, the defendant, at any time before the trial, may apply, upon notice, to the court in which

the action is brought, or any judge thereof, to vacate or modify the same. The application may be made upon the petition and affidavits upon which the injunction is granted, or upon affidavits on the part of the party enjoined, with or without answer. The order of the judge, allowing, dissolving or modifying an injunction, shall be returned to the office of the clerk of the court in which the action is brought, and recorded and obeyed, as if made by the court.

Where a preliminary injunction has been granted without notice, a motion to dissolve may, upon notice, be made at any time before the trial, and this notwithstanding a demurrer has been previously filed. *Challiss v. Commissioners*, 15-49.

Injunction will not lie where petition fails to show any right to bring the suit, or any interest in the result. *Henderson v. Marcell*, 1-137.

(4061) **§ 251. Oppose by Affidavits.** If application be made upon affidavits, on the part of the defendant, but not otherwise, the plaintiff may oppose the same, by affidavits or other evidence, in addition to that on which the injunction was granted.

(4062) **§ 252. Injunction Obtained by Defendant.** A defendant may obtain an injunction upon an answer, in the nature of a counter-claim. He shall proceed in the manner hereinbefore prescribed.

(4063) **§ 253. Enjoining Nuisance; Tax.** An injunction may be granted to enjoin the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same; and any number of persons whose property is affected by a tax or assessment so levied, may unite in the petition filed to obtain such injunction. An injunction may be granted in the name of the state to enjoin and suppress the keeping and maintaining of a common nuisance. The petition therefor shall be verified by the county attorney of the proper county, or by the attorney general, upon information and belief, and no bond shall be required. [L. 1885, ch. 153, § 1 (§ 253, as amended); took effect March 17, 1885.]

Possibly said section may be applicable in some cases, for the purpose of enjoining the kind of taxes sought to be enjoined in this case; but even if it is, it does not authorize all the present plaintiffs to join in the present action. It authorizes only such persons to join in an action as have property affected by the same illegal tax. (12-140.) *McGrath v. Newton*, 29-371.

Levy of taxes made outside the state, tax will be enjoined. *Commissioners v. Barker*, 25-258.

Private person whose property is not affected, cannot obtain an injunction

to prevent collection of tax. Any number of persons affected by an illegal tax may unite as plaintiffs. The court cannot restrain the collection of taxes as to any person not a party and who does not ask. *Bridge Co. v. Commissioners*, 10-326.

Any number affected may join as plaintiffs. *Gilmore v. Norton*, 10-503.

(*Gen. Stat.*) The remedy of injunction will not lie to restrain the collection of a tax for mere irregularities. The failure of the township assessors to meet and agree upon an equal basis of valuation, is a mere irregularity. An excessive levy, where the excess is only slight, is a mere irregularity. *Smith v. Commissioners*, 9-300.

(*Gen. Stat.*) A county board has no authority, arbitrarily, to increase the assessment of a citizen on his personal property, without notice, or evidence, or opportunity given to the taxpayer to be heard; and the taxes levied on such assessment, so far as they exceed a just amount, may be enjoined. *Commissioners v. Lang*, 8-287.

(*Gen. Stat.*) If the tax is illegal, injunction is no doubt the proper remedy. *Parker v. Winsor*, 5-366.

ARTICLE 13—RECEIVERS AND OTHER PROVISIONAL REMEDIES.

SEC.

- 254. Appointment of receiver.
- 255. Who shall not be appointed.
- 256. Oath and undertaking.
- 257. Powers of receiver.
- 258. Investment of funds.

SEC.

- 259. Disposition of property in hands of trustee.
- 260. Disobedience of order of court under this article, how punished.

(4064) **§ 254. Appointment of Receiver.** A receiver may be appointed by the supreme court, the district court, or any judge of either, or in the absence of said judges from the county, by the probate judge: *First*, In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured. *Second*, In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt. *Third*, After judgment, to carry the judgment into effect. *Fourth*, After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned un-

satisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment. *Fifth*, In the cases provided in this code, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights. *Sixth*, In all other cases where receivers have heretofore been appointed by the usages of the courts of equity.

The grounds for the appointment of a receiver need not be incorporated into the pleadings. It is enough if the latter disclose a case of the class in which receivers may be appointed, and the special reasons therefor may be set out on a motion. *Hottenstein v. Conrad*, 9-435.

Partner in possession refusing other partner control, and refusing to account, receiver should be appointed. *Hottenstein v. Conrad*, 9-435.

(4065) **§ 255. Ineligible Receiver.** No party, or attorney, or person interested in an action, shall be appointed receiver therein.

(4066) **§ 256. Oath and Bond.** Before entering upon his duties, the receiver must be sworn to perform them faithfully, and with one or more sureties, approved by the court or judge, execute an undertaking to such person, and in such sum as the court or judge shall direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.

(4067) **§ 257. Receiver; Powers.** The receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize.

The ordinary rules applicable to granting leave to parties to file answers do not prevail in cases of receivers, and neither the code nor the practice of courts of equity authorized him to file an answer in this case without first applying to the court and obtaining its consent. *Patrick v. Eells*, 30-687.

In an action, the defendant answered that after suit he had been garnisheed in another case, in same court, wherein a receiver was plaintiff and this plaintiff was defendant; held to be a good answer. *McDonald v. Carney*, 8-24.

(4068) **§ 258. Funds.** Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order shall be made, except upon the consent of all the parties to the action.

(4069) **§ 259. Disposition of Property.** When it is admitted, by the pleading or examination of a party, that he has in his possession or under his control any money or other

thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court or delivered to such party, with or without security, subject to the further direction of the court.

(4070) **§260. Disobedience; Contempt.** Whenever, in the exercise of its authority, a court shall have ordered the deposit or delivery of money or other thing, and the order is disobeyed, the court, besides punishing the disobedience as for a contempt, may make an order requiring the sheriff to take the money, or thing, and deposit or deliver it, in conformity with the direction of the court.

ARTICLE 14—ISSUES.

SEC.

261. Kinds of issues.

262. Issue of law.

SEC.

263. Issue of fact.

264. Issues of law and fact.

(4071) **§261. Kinds.** Issues arise on the pleadings, where a fact or conclusion of law is maintained by one party, and controverted by the other. They are of two kinds: *First*, Of law. *Second*, Of fact.

Where the record does not show the original petition, and there was no answer to the amended petition, the supreme court cannot tell what the issues were. *Brookover v. Esterly*, 12-149.

On appeal from justice's court, an answer having been filed there and no new pleadings filed, the court may limit the investigation to the issues made by the pleadings in the justice's court. *Donnell v. Clark*, 12-154.

A general denial, as an answer to an action on a judgment, does not put in issue the irregularity of the proceedings on which the judgment was based, or the correctness of the judgment. The only inquiry that can be made on such an issue, when the judgment is offered in evidence, is, was such a judgment rendered, and had the court rendering it jurisdiction of the parties and the subject-matter? *U. P. R. R. v. McCarty*, 8-125.

Where an instrument is set out in full in an answer, and its execution not denied under oath, no issue is raised as to its existence, and therefore there is no error in rejecting either the original or a copy, when offered in evidence. *Washington Ins. Co. v. Haney*, 10-525; *Gulf R. R. v. Wilson* 10-105.

The issues in a cause are those certain points controverted by the pleadings, and such issues only are to be submitted to a jury. *Wiley v. Keokuk*, 6-94.

An answer which fails to raise any substantial issue, but expressly admits the execution of the instrument sued upon and described in the petti-

tion to which such answer is directed, will not entitle a defendant to demand a jury for the assessment of damages, and in such case it is not error for the court to refuse such demand if made. *Douglas v. Rhinehart*, 5-393.

(4072) **§262. Issue of Law.** An issue of law arises upon a demurrer to the petition, answer or reply, or to some part thereof.

Where no answer or demurrer is filed, no issue, either of fact or law, arises. *Race v. Malony*, 21-36.

No witness shall be subpoenaed in any case while the cause stands upon issue of law. *Clark v. White*, 17-182.

This section applied to § 306. An order setting aside a default judgment, and allowing defendant to answer, is not reviewable pending the suit. *McCullough v. Dodge*, 8-476.

(4073) **§263. Issue of Fact.** An issue of fact arises: *First*, Upon a material allegation in the petition, controverted by the answer; or, *Second*, Upon new matter in the answer, controverted by the reply; or, *Third*, Upon new matter in the reply, which shall be considered as controverted by the defendant without further pleading.

This section applied to § 306. An order setting aside a default judgment, and allowing defendant to answer, is not reviewable pending the suit. *McCullough v. Dodge*, 8-476.

(4074) **§264. Issue of Law and Fact.** Issues, both of law and fact, may arise upon different parts of the pleadings in the same action. In such cases the issues of law must be first tried, unless the court otherwise direct.

ARTICLE 15—TRIAL.

SEC.

- 265. Trial, what is.
- 266. Issues, how tried.
- 267. The same.
- 268. Separate trial between plaintiff and one of several defendants allowed, when.

TRIAL BY JURY.

- 269. Mode of summoning jury.
- 270. Causes for challenge.
- 271. Order in which parties challenge; peremptory challenge.
- 272. Vacancy to be filled before further challenges.
- 273. Talesmen to be selected, when.
- 274. Oath of jury.

SEC.

- 275. Order of proceeding in the trial.
- 276. Exceptions to instructions.
- 277. View by jury.
- 278. Deliberation of jury, how conducted.
- 279. Admonition when jury permitted to separate.
- 280. Jury may return to court for information.
- 281. May be discharged, when.
- 282. Case to be tried again, when.
- 283. Rendering verdict.
- 284. Verdict shall be written and signed by foreman; verdict defective in form, how corrected.

VERDICT.

- 285. General and special verdicts.
- 286. Kinds of verdicts to be rendered; verdict to be filed.
- 287. Special finding controls general verdict.
- 288. Jury must assess amount of recovery.

TRIAL BY THE COURT.

- 289. Trial by jury waived, how.
- 290. Finding by court, how to be stated.

TRIAL BY REFEREES.

- 291. When issues may be referred by consent.
- 292. Court may direct reference, in what cases.
- 293. Trial before referees, how conducted; their powers and duties; judgment.
- 294. Referees, how chosen.
- 295. To sign exceptions.
- 296. Reference in vacation, how made.
- 297. Oath of referees.
- 298. Compensation.

EXCEPTIONS.

- 299. Exception, what is.
- 300. When to be taken.
- 301. Must be stated, how.
- 302. How taken when facts appear on record.

- 303. How taken when facts do not appear on record; to be signed by judge.
- 304. Immaterial exceptions.
- 305. Exceptions may be withdrawn, when.

NEW TRIAL.

- 306. New trial granted, for what causes.
- 307. Not granted, for what causes.
- 308. Application for new trial to be made, when.
- 309. How made; certain causes to be sustained by affidavits.
- 310. Application may be made by petition, when; proceedings.

GENERAL PROVISIONS.

- 311. Damages.
- 312. Provisions respecting trials by jury applied to trials by court.
- 313. Trial docket.
- 314. Order in which cases are to be tried.
- 315. Triable, when.
- 316. Continuance.
- 317. Motion for continuance on account of absent evidence, how made; continuance not granted when facts alleged in affidavit are admitted.
- 318. Trial docket for use of bar.

(4075) **§ 265. Trial.** A trial is a judicial examination of the issues, whether of law or fact, in an action.

It has been the common practice in this state, in a case tried to the court without a jury, for the parties to produce their evidence and submit the case to the court at one term, and for the court to take the evidence and arguments under advisement to the next or succeeding term. This power is, we think, unquestionable, and in the very nature of things must inhere in the court, unless inhibited by statute. *Tarpenning v. Cannon*, 28-667.

Not abuse of discretion to refuse jury trial in a divorce case. *Carpenter v. Carpenter*, 30-712.

Where there are no issues there can be no trial. *Race v. Malony*, 21-36.

(4076) **§ 266. Issues, How Tried.** Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided.

A jury trial cannot be demanded as a matter of right in suits in equity. *Woodman v. Davis*, 32-347.

In divorce, this class of cases must be tried by the court, subject to its power to order any issue or issues to be tried by a jury, or referred, as provided in the code. *Carpenter v. Carpenter*, 30-718.

In a proceeding in the nature of an action to quiet title, a jury is not a matter of right. *Bennett v. Wolverton*, 24-288.

In an action of replevin, party may have a jury. *Watson v. Jackson*, 24-443.

In an action to have a certain deed set aside, and to have the land mentioned in such deed made subject to the payment of a certain judgment previously rendered in favor of the plaintiff and against one of the defendants, the defendants were not as a matter of right entitled to have the issues tried by a jury. *McCardell v. McNay*, 17-435.

In action to contest a will, the parties are not as a matter of right entitled to a jury. *Rich v. Bowker*, 25-12.

This was not an action for the recovery of money, or of specific real or personal property, and a party is not entitled to a jury trial in any other kind of action. *Sword v. Allen*, 25-68.

Suit by partner for accounting against his copartner; the issue as to the term and duration of the partnership may be submitted to one jury, a reference may be had to state the account, and a submission to a second jury of damages under the partnership contract. *Carlin v. Donegan*, 15-495.

First count stated cause of action for injuries to mill-dam; in that jury may be had by either party. The second count stated cause of action for a perpetual injunction to restrain defendants from maintaining and continuing said dam. The court had the right in its discretion to send the issues therein to a jury. *Akin v. Davis*, 11-591.

Trials by jury, and attachments, are both allowed in "actions for the recovery of money;" but it does not therefore follow that an attachment cannot be had in a foreclosure of mechanic's lien. *Gillespie v. Lovell*, 7-424.

When the issues have been made up in a case, and when one of the parties has failed to appear at the trial, it is competent for the party who is present to submit the issues to the court for decision and judgment under § 289. *U. P. R. R. v. Horney*, 5-341.

In an action for a judgment on a note, and foreclosure of a mortgage securing it, and adjustment of the priority of the liens, on demand of defendant the issues should have been sent to a jury, no reference of the case having been made. (The case does not say what the issues were.—*TAYLOR*.) *Clemenson v. Chandler*, 4-558.

(4077) § 267. **Issues, How Tried.** All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by a jury, or referred as provided in this code.

In action to contest a will, a jury is not a matter of right. *Rich v. Bowker*, 25-12.

This is not an action for the recovery of money, or of specific real or

personal property, and a party is not entitled to a jury trial in any other kind of action. *Sword v. Allen*, 25-68.

Not abuse of discretion to refuse jury in a divorce case. *Carpenter v. Carpenter*, 30-712.

A jury trial cannot be demanded as a matter of right in suits in equity *Woodman v. Davis*, 32-347.

Many of the alleged errors are wholly without merit; for instance, the objection made to the court sending the issues to the jury for trial is untenable. (18-253.) *Yeamans v. James*, 27-212.

In an equity case like this, involving many issues, as this does, the court has the power, without giving any reason therefor, to send any portion of the issues which it chooses to a jury to be tried, and to require the jury to make a separate finding upon each of such issues; and the court may try the other issues in the case itself, or it may send them or any portion of them to another jury, or a referee, to be tried. (5-496.) *Hixon v. George*, 18-257.

After a jury has found a verdict and returned it into court, but before it is announced, it is hardly a proper time to ask the court to require the jury to make certain special findings. *Hairgrove v. Millington*, 8-486.

In all original proceedings the supreme court has power to send issues of fact to a jury for trial, whether as a matter of strict right either party is entitled to a jury trial or not. *State v. Allen*, 5-214.

(4078) § 268. **Separate Trial.** A separate trial between the plaintiff and any or all of several defendants, may be allowed by the court, whenever justice will be thereby promoted.

As this case was tried by the court without a jury, we see no special necessity or advantage of a separate trial of the issues involved, and therefore no abuse of discretion on the part of the court in refusing such separate trials. *Rice v. Hodge*, 26-169.

The court is authorized to render a judgment against one of the defendants in ejectment, and leave the action to proceed against the other. *Burton v. Boyd*, 7-30.

TRIALS BY JURY.

(4079) § 269. **Jury; Summoning.** The general mode of summoning the jury is such as is or may be provided by law.

In an action to contest a will, the parties are not, as a matter of right, entitled to have the issues tried by a jury, and therefore, when, in such a proceeding, certain issues of fact are submitted to a jury, the plaintiff has no legal right to demand that a jury render a general verdict. *Rich v. Bowker*, 25-7.

Injunction to restrain injury to mill dam; jury not a matter of right. *Sword v. Allen*, 25-68.

In an action in which the parties are entitled to a trial by jury, and where the parties have not waived a jury trial, it is error for the court to

render a judgment upon the issues therein, except upon the verdict of a jury. *Maduska v. Thomas*, 6-153.

Suit on note and mortgage; answer denies execution of the same and pleads usury, but is not verified; the execution of the note and mortgage is not put in issue; and in such case the plaintiff need not produce the note and mortgage on the trial, nor the power of attorney under which they were executed. *Gaylord v. Stebbins*, 4-42.

An answer which fails to raise any substantial issue, but expressly admits the execution of the instrument sued upon and described in the petition, will not entitle the defendant to demand a jury for the assessment of damages. *Douglas v. Rhinehart*, 5-393.

In statutory and chancery proceedings, the legislature is competent to dispense with a jury. *Kimball v. Connor*, 3-415; *Gillespie v. Lovell*, 7-424.

In original proceedings the supreme court has power to send issues of fact to a jury for trial, whether as a matter of strict right either party is entitled to a jury trial or not. *State v. Allen*, 5-214.

In an action for judgment on a note and foreclosure of a mortgage securing it, and adjustment of the priority of liens, on demand of defendant the issues should have been sent to a jury, no reference of the case having been made. *Clemenson v. Chandler*, 4-558.

Where issue of payment on note and mortgage is made, party is entitled to a jury. *Cavanaugh v. Fuller*, 9-233.

(4080) **§ 270. Causes for Challenging Jury.** If there shall be impeanneled, for the trial of any cause, any petit juror, who shall have been convicted of any crime which by law renders him disqualified to serve on a jury; or who has been arbitrator on either side, relating to the same controversy; or who has an interest in the cause; or who has an action pending between him and either party; or who has formerly been a juror in the same cause; or who is the employer, employé, counselor, agent, steward or attorney of either party; or who is subpœnaed as a witness; or who is of kin to either party; or any person who shall have served once already on a jury, as a talesman on the trial of any cause, in the same court during the term, he may be challenged for such causes; in either of which cases the same shall be considered a principal challenge, and the validity thereof be tried by the court; and any petit juror who shall be returned upon the trial of any of the causes hereinbefore specified, against whom no principal cause of challenge can be alleged, may, nevertheless, be challenged on suspicion of prejudice against, or partiality for, either party, or for want of competent knowledge of the English language, or any other cause that may render him, at the time, an unsuitable juror; and the validity of such challenge shall be determined by the court.

Person over sixty years of age is not incompetent if he chooses to waive his privilege. *Moore v. Case*, 10-288.

A resident citizen and taxpayer of a city is incompetent to serve as a juror in an action wherein the city is sued to recover damages for personal injuries resulting in the death of the injured party. *Gibson v. Wyandotte*, 20-156.

When a juror swears he has no previous knowledge of the case, the party is not bound to examine the record to find out if he did not serve upon a previous trial; new trial granted will not be set aside. *Lane v. Scoville*, 16-402.

Where a technical disqualification is by statute ground for principal challenge of a juror, a juror must come within the very terms of the disqualification, or the challenge will be overruled. On a challenge for cause, if the trial judge is in doubt as to the impartiality of a juror, he should give the parties the benefit of the doubt, and excuse the juror. New trials should not be granted on account of partiality in juror, unless made plainly to appear. *M. K. & T. R. R. v. Munkers*, 11-223.

It appears that after the juror had served as a talesman he had been called to serve as a regular juror for the term, in place of a juror excused; the challenge should have been sustained. *Wiley v. Keokuk*, 6-103.

(4081) **§ 271. Order of Challenge.** The plaintiff first, and afterward the defendant, shall complete his challenges for cause. They may then, in turn, in the same order, have the right to challenge one juror each, until each shall have peremptorily challenged three jurors, but no more.

A party should not be allowed to decline to exercise his peremptory challenges in discharging supposed incompetent jurors, and thereby to keep the question open as to their incompetency until after it is ascertained that the verdict is against him, and then to allow him to again raise the question as to competency. *F. E. D. & W. R. R. v. Ward*, 29-363.

When this case was tried it was not error, under code 1862, to impanel the jury by placing twelve men in the box, and as each juror was called require each party to accept or challenge him for cause or peremptorily. *Smith v. Brown*, 8-609.

(4082) **§ 272. Vacancies in Jury.** After each challenge, the vacancy shall be filled before further challenges are made; and any new juror thus introduced may be challenged for cause as well as peremptorily.

(4083) **§ 273. Talesmen.** When the requisite number of jurors cannot otherwise be obtained, the sheriff shall select talesmen to supply the deficiency from the bystanders, or the body of the county, as the court may direct.

(4084) **§ 274. Oath of Jury.** The jury shall be sworn to well and truly try the matters submitted to them in the case in

hearing, and a true verdict give, according to the law and the evidence.

The court permitting a reply to be filed after the jury sworn, it is not necessary that the jury should be resworn. *Grant v. Pendery*, 15-242.

(4085) § 275. **Order of Procedure; Trial.** When the jury has been sworn, the trial shall proceed in the following order unless the court for special reasons otherwise directs: *First*, The party on whom rests the burden of the issues may briefly state his case, and the evidence by which he expects to sustain it. *Second*, The adverse party may then briefly state his defense, and the evidence he expects to offer in support of it. *Third*, The party on whom rests the burden of the issues must first produce his evidence; after he has closed his evidence the adverse party may interpose and file a demurrer thereto, upon the ground that no cause of action or defense is proved. If the court shall sustain the demurrer, such judgment shall be rendered for the party demurring as the state of the pleadings or the proof shall demand. If the demurrer be overruled, the adverse party will then produce his evidence. *Fourth*, The parties will then be confined to rebutting evidence unless the court for good reasons in furtherance of justice permits them to offer evidence in their original case. *Fifth*, When the evidence is concluded and either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered, and signed by the party or his attorney asking the same, and delivered to the court. The court shall give general instructions to the jury, which shall be in writing, and be numbered, and signed by the judge, if required by either party. *Sixth*, When either party asks for special instructions to be given to the jury, the court shall either give such instructions as requested, or positively refuse to do so; or give the instructions with a modification in such manner that it shall distinctly appear what instructions were given in whole or part, and in like manner those refused, so that either party may except to the instructions as asked for, or as modified, or to the modification, or to the refusal. All instructions given by the court must be signed by the judge, and filed together with those asked for by the parties as a part of the record. *Seventh*, After the instructions have been given to the jury, the cause may be argued. [L. 1881, ch. 126, § 3, (§ 275, as amended); took effect May 10, 1881.]

It is the duty of the court to instruct the jury on the law governing the case, as he may think is shown by the pleadings and evidence; and if a party to the suit desires other or different instructions, he must make his

request for them in writing, under § 275 of the code; and if he fail to do so, then the instructions given stand as the law governing that case for that trial, and his only remedy is to except to the instructions given, move for a new trial on such exceptions, and if the motion is overruled bring proceedings in error in this court. *Douglas v. Geiler*, 32-501.

Prior to 1881, § 275 of the civil code provided that the court should instruct the jury after the argument of the case had been concluded, but in 1881 this section of the code was so amended that the court was thereafter required to give its instruction to the jury prior to the commencement of the argument. *Foster v. Turner*, 31-63.

Under this section the court is expressly authorized in its discretion to direct the order in which the trial shall proceed, and in the exercise of a sound judicial discretion we think the court did not err in permitting the plaintiff below to introduce his evidence, tending to show that the tax deed to G. was void at the time such evidence was introduced. *Board v. Linscott*, 30-263.

If the testimony is such that a jury ought to consider it, the time or manner in which it is presented is of comparatively little moment. Only in an extreme case will it be held that the manner or order of presenting competent testimony violates a substantial right of either party. *Blake v. Powell*, 26-327.

Under our practice the party on whom rests the burthen of the issues is to first produce his evidence. *Rich v. Bowker*, 25-12.

Where a party desires that only written instructions shall be given to the jury, the party so desiring must make the request therefor within such reasonable time before the charge is to be given, that the court may have sufficient time to prepare such written instructions; and such reasonable time for making the request is generally at or before the close of the evidence, and a request made only about five minutes before the conclusion of the argument is made too late. *A. T. & S. F. R. R. v. Franklin*, 23-74.

The demurrer to evidence and the ruling thereon is merely one step in the progress of the trial. *Gruble v. Ryus*, 23-196.

Judgment reversed for failure to instruct in writing when requested. *Jenkins v. Levis*, 23-255.

(*L. 1872.*) Instructions must be in writing when demanded. *Atchison v. Jansen*, 21-570.

(*L. 1872.*) The district court, after sustaining a demurrer to evidence interposed by the defendant, and before rendering any judgment thereon, may, in its discretion, allow the plaintiff to dismiss his action without prejudice. *Schafer v. Weaver*, 20-297.

Demurrer to evidence properly sustained in this case. *Edwards v. Crume*, 13-351; *Noffziger v. McAllister*, 12-323.

There was a total failure of evidence on one material point, and the demurrer was therefore properly sustained. *St. J. & D. C. R. R. v. Dryden*, 17-280.

The right to open and close the case belongs to him upon whom rested the burden of the issues. *Kunz v. Grund*, 12-549.

The defendant, on cross examination of a plaintiff's witness, has no right at that time, except by consent of parties and permission of court, to make the witness his own and prove his side of the case. *DaLee v. Blackburn*, 11-202.

New trial granted after a demurrer to evidence has been sustained, will require a stronger case than if a new trial had been refused, before the supreme court will reverse. *Ottawa v. Washabaugh*, 11-127.

In civil cases the statute seems to provide that instructions reduced to writing and signed by the judge shall, when filed, become a part of the record. *State v. Lewis*, 10-160.

When all the evidence is written, the court may permit the jury to take it to their room, but where partly written it is discretionary with the court. *Hairgrove v. Millington*, 8-485.

(*Code 1859, § 277.*) In a slander suit, form of answer is justification, but the matter is not; the action of the court in allowing the plaintiff to open and close the trial, both in testimony and argument, is not reviewable except in extraordinary cases. *Schwartzel v. Dey*, 3-244.

(*Code 1859, § 277.*) A general denial is equivalent to the plea of the general issue at common law, and traverses every material allegation of the petition, and puts the plaintiff upon the proof of his cause of action. *Perkins v. Ermel*, 2-330.

(*Code 1859, § 278.*) If a party, as a matter of right, desires the court to pass upon any proposition of law pertinent to the case, he must prefer his request before argument, or he waives his privilege. A refusal on such ground to pass upon propositions preferred after argument, would not be error; but when the court passes upon propositions preferred after argument, it is bound to give the law correctly. *Firman v. Blood*, 2-497.

(4086) **§ 276. Exceptions to Instructions.** A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions; but it shall be sufficient to write at the close of each instruction, "Refused and excepted to," or, "Given and excepted to," which shall be signed by the judge.

Where the charges are separated and numbered, and exceptions are taken to each, the exceptions should be noted at the close of each instruction. Of course, where a general exception is taken to the whole charge of the court, and a large portion of such charge contains the true declaration of the law as applied to the case on trial, such an exception is entirely unavailing. *Carson v. Funk*, 27-526.

In civil cases, the statute seems to provide that instructions reduced to writing and signed by the judge shall, when filed, become part of the record. *State v. Lewis*, 10-160.

Entering instructions upon the journal, and noting the exceptions

thereto, does not make them a part of the record. (7-173.) *Kshinka v. Cawker*, 16-64.

Instructions copied into a transcript, without having been made part of the record in the court below, are not part of the record in this court, and cannot be examined. Entering instructions upon the journal, and noting the exceptions thereto, does not make them part of the record. *McArthur v. Mitchell*, 7-176.

(4087) **§ 277. View by Jury.** Whenever, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial.

The refusal to allow the jury to view the premises in another county, not an abuse of discretion in this case. *K. C. R. R. v. Allen*, 22-291.

(4088) **§ 278. Jury; Deliberation.** When the case is finally submitted to the jury, they may decide in court or retire for deliberation. If they retire, they must be kept together, in some convenient place, under charge of an officer, until they agree upon a verdict or be discharged by the court, subject to the discretion of the court to permit them to separate temporarily at night, and at their meals. The officer having them under his charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they are agreed upon their verdict, unless by order of the court; and he shall not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

It is not improper for a trial court, when the jury have reported that they could not agree, to urge them to make another effort in a spirit of conciliation; and if, in making such remarks, a phrase of doubtful import is dropped, and not excepted to or the attention of the court called to it, the supreme court will not for that reason reverse the judgment. (*Pacific R. R. v. Nash*, 7-280.) *Moore v. Case*, 10-288.

When all the evidence is written, the court may permit the jury to take it with them to their jury room, but when part is written it is discretionary with the court. *Hairgrove v. Millington*, 8-480.

(4089) **§ 279. Admonition.** If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed

by, any other person, on any subject of the trial, and that it is their duty not to form and express an opinion thereon, until the case is finally submitted to them.

The law does not prohibit a separation of the jury, with proper admonition by the court, before the case is submitted to them. *Lewis v. State*, 4-298.

Question whether the mere fact of separation of some of the jury from their fellows is sufficient to set aside verdict. *Perkins v. Ermel*, 2-325.

(4090) **§ 280. Return to Court.** After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court, where the information on the point of law shall be given in writing, and the court may give its recollections as to the testimony on the point in dispute, in the presence of, or after notice to, the parties or their counsel.

When a jury ask for further instructions, the court may exercise some discretion as to the extent of its instructions, and it would be error to give additional instructions in the absence of parties or counsel. *Joseph v. National Bank*, 17-261.

(4091) **§ 281. Discharged.** The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing.

Discharging jury in absence of counsel and party, held to be immaterial error, and not sufficient cause for reversal; court may discharge jury after it satisfactorily appears there is no probability of agreeing. *State v. White*, 19-448.

(4092) **§ 282. Discharge of Jury; Trial.** In all cases where the jury are discharged during the trial, or after the cause is submitted to them, it may be tried again immediately, or at a future time, as the court may direct.

(4093) **§ 283. Verdict.** When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and their verdict rendered by their foreman. When the verdict is announced, either party may require the jury to be polled, which is done by the clerk or the court asking each juror if it is his verdict. If any one answers in the negative, the jury must again be sent out, for further deliberation.

A party has in all cases the right to have the jury polled. *State v. Muir*, 32-482; *Maduska v. Thomas*, 6-153.

(4094) § **284. Verdict.** The verdict shall be written, signed by the foreman and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete, and the jury discharged from the case. If, however, the verdict be defective in form only, the same may, with the assent of the jury, before they are discharged, be corrected by the court.

VERDICT.

(4095) § **285. General and Special.** The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds facts only. It must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented as that nothing remains to the court but to draw from them conclusions of law.

The facts must be so presented as that nothing remains to the court but to draw from them conclusions of law, when a special verdict is rendered. *McGonigle v. Gordon*, 11-174.

The refusal of the court to direct a special verdict, compels this court to send the case back for a new trial. *L. L. & G. R. R. v. Rice*, 10-435.

Facts in issue is meant by facts, same as § 87. *Nat. Bank v. Peck*, 8-666.

It is not necessary, nor proper, that a special verdict should contain facts admitted by the pleadings. *Burton v. Boyd*, 7-28.

When a general verdict is found, and answers are made to certain questions as to specific facts, the answers do not necessarily constitute such a special verdict as may be necessary to support a judgment, but they must all be in harmony with the general verdict and with each other. If the answers to specific questions are not full, the party desiring should ask that they be directed to make more perfect answers. *Hazard v. Viergutz*, 6-487.

(4096) § **286. Verdict; Questions; Findings.** In all cases the jury shall render a general verdict, and the court shall in any case at the request of the parties thereto, or either of them, in addition to the general verdict, direct the jury to find upon particular questions of fact, to be stated in writing by the party or parties requesting the same. [L. 1874, ch. 91, § 1; took effect April 25, 1874.]

Under § 286 of the civil code, as it now reads, and as it has read since 1874, the jury are not required to do anything except to render a general

verdict, and in connection therewith to make findings "upon such *particular* questions of fact" as are stated in writing by one or both of the parties, and as requested by such party or parties. All that the jury are required to do, is merely to give answers with reference to such facts as they are stated by the parties. *Foster v. Turner*, 31-61.

The jury, in giving answers to "*particular* questions of fact," may sometimes be required to state facts themselves, to the extent of giving amounts, dates, weights, sizes, speed or velocity, time, distances, etc., and of designating between alternative facts; but all such answers have relation to the facts already mentioned in the "*particular* questions of fact" stated by the parties, and not to new facts to be stated by the jury themselves in answer to some very general question of fact. *Foster v. Turner*, 31-62.

Under § 286 of the code, the jury are not required to do anything except to render a general verdict, and in addition thereto to make findings upon such particular questions of fact as are stated in writing by one or both parties, and as requested by such party or parties. *M. P. R. R. v. Reynolds*, 31-136.

X At one time this section required that the trial court, at the request of either party, should "direct the jury to find a special verdict in writing upon all or any of the issues in the case;" but in 1874 special verdicts were abolished and the present statute upon the subject was adopted. *Foster v. Turner*, 31-60.

Section 286 of the code provides, that the court shall, in any case, at the request of the parties thereto, or either of them, in addition to the general verdict, direct the jury to find upon particular questions of fact, to be stated in writing by the party or parties requesting the same. This section does not give a discretion to the court, but a right to the parties. It appears, however, that a rule of the court required that notice of asking particular questions of fact must be brought to the court before the argument to the jury. The findings in this case were not presented until after the argument, and after the instructions of the court to the jury. We think the rule adopted by the court a reasonable one; therefore the refusal to submit the special findings was not error. *Rizer v. James*, 26-224.

By failure of court to compel the jury to answer specifically special questions submitted to them, the plaintiff was deprived of a substantial right given to him by the statute. *Johnson v. Husband*, 22-277.

The court refused to direct the jury to find specially upon any question of fact relating to negligence on the part of the plaintiff; as to whether error or not in this case, court is divided. *C. B. U. P. R. R. v. Hotham*, 22-53.

We do not, of course, understand the law as compelling the court to submit every question presented, even though irrelevant, immaterial, or frivolous; but where a question is submitted as to a particular fact which is pertinent to the issues, and necessarily to be determined by the jury, the court has no discretion to refuse. (10-426.) *Bent v. Philbrick*, 16-192.

X *Quere:* Is a party now entitled to a special verdict. *K. P. R. R. v. Pointer*, 14-64.

(*Laws 1870.*) It was the duty of the court to instruct the jury to return a special verdict. (10-426.) *Bush v. Peake*, 14-291.

(*Laws 1870.*) It is the duty of the court, at the request of either party, to instruct the jury, if they return a general verdict, to find upon particular questions of fact, to be stated in writing, and direct a written finding thereon. *Wyandotte v. White*, 13-196.

The court in equity cases may, in its discretion, follow § 286. *Akin v. Davis*, 11-591.

If, in a special verdict, any fact essential to sustain a judgment is not found, there can be no judgment on the verdict. *McGonigle v. Gordon*, 11-166.

Under General Statutes, it was discretionary with the court whether to require findings upon particular questions of fact, when a general verdict was returned. *K. P. R. R. v. Reynolds*, 8-633.

After a jury has found a verdict and returned it into court, but before it is announced, it is hardly a proper time to ask the court to require the jury to make certain special findings. *Hairgrove v. Millington*, 8-486.

Under § 286, the right of the court to direct the jury to find specially in cases of this kind is purely discretionary, and the refusal of the court to do so cannot be assigned as error. *Topeka v. Tuttle*, 5-312.

(4097) **§ 287. Special Finding Inconsistent.** When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly.

The verdict of a jury is a part of the record in the case, and need not be embodied in a bill of exceptions. Again, if the special findings returned by the jury are in conflict with the general verdict, a motion to enter judgment upon special findings, the general verdict to the contrary notwithstanding, calls the attention of the court sufficiently to that matter, without embodying this motion a second time in the request for a new trial. *Harvester Co. v. Cummings*, 26-370.

When the special findings of fact are inconsistent with the general verdict, the former control the latter, and the court must give judgment accordingly. *A. & D. R. R. v. Lyon*, 24-748.

In order to give full force to §§ 285 and 286, this section was given. *National Bank v. Peck*, 8-668.

(4098) **§ 288. Jury Must Assess Amount.** When, by the verdict, either party is entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of recovery.

It was the duty of the court to instruct the jury as to the rate of interest, and then they might calculate it; failing to do so, and the jury failing to compute the interest, the court could not take such interest into consideration in rendering this judgment. *Educational Ass'n v. Hitchcock*, 4-41.

TRIAL BY THE COURT.

(4099) **§ 289. Waiver of Jury.** The trial by jury may be waived by the parties, in actions arising on contract, and with the assent of the court in other actions, in the following manner: By the consent of the party appearing, when the other party fails to appear at the trial by himself or attorney. By written consent, in person or by attorney, filed with the clerk. By oral consent, in open court, entered on the journal.

The defendant has no valid complaint because the case was tried by the court without a jury; by not appearing at the time the case came on to be heard, he waived his right to a jury trial. *Green v. Bulkley*, 23-136.

The defendant, by not appearing at the time the case came on to be heard, waived his right to a jury trial. *Cohen v. Hamill*, 8-623.

When issues have been made up in a case, and when one of the parties has failed to appear at the trial, it is competent for the party who is present to submit the issues to the court for decision and judgment, under § 289. *U. P. R. R. v. Horney*, 5-341.

Trial may be by court, the plaintiff consenting, in default cases. *Goff v. Russell*, 3-214.

✓ (4100) **§ 290. Finding by Court.** Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state, in writing, the conclusions of fact found, separately from the conclusions of law.

Under § 286 of the code, as it read from 1870 up to 1874, the jury were required to prepare in writing and render the special verdict which they might agree upon, without any aid from either of the parties, just as a court is now required, under § 290 of the civil code, to prepare and deliver its own special findings, without the aid of either of the parties. *Foster v. Turner*, 31-61.

This section provides in substance, that in all cases tried by the court without a jury, if either party requests it, the court shall state in writing its conclusions of fact, separately from its conclusions of law; and there is not the slightest intimation in the section that the party making the request shall prepare for the court, or submit to it, any statements of fact or any propositions of law, with a view to having the court make findings thereon, or state conclusions with reference thereto. *A. T. & S. F. R. R. v. Ferry*, 28-688.

Now if a district court having jurisdiction of the parties and subject-matter enters judgment in a case where questions of fact are involved, and a jury is waived by the parties, but fails to state conclusions of fact and of law in accordance with the request of one of the parties, the judgment

rendered by it would be erroneous, but clearly not void. *Garner v. State*, 28-794.

As to findings in county-seat elections. (L. 1871, ch. 79.) *Garner v. State*, 28-793.

Where a case is tried by the court without a jury, and no request is made for special or separate findings, the court is not bound to find specially, or to state its conclusions of law separately from its findings of fact. *Green v. Williams*, 21-64.

In this case neither party requested that the court should make separate findings, either of fact or of law, and therefore the court did not err in finding generally. *Hixon v. George*, 18-257.

We are all of the opinion that the statute requires a written finding, and that a failure to incorporate one in the record is error; and Mr. Justice Valentine is inclined to the opinion that such an omission is fatal to the judgment, and of itself sufficient to compel a reversal, while the chief justice and the writer of this opinion are, on the other hand, inclined to regard the error as in a case like the present, working no prejudice to the substantial rights of the defendant. *L. L. & G. R. R. v. Commissioners*, 18-188.

If the party had desired this court to determine whether certain facts constituted extreme cruelty, § 290 points out the mode. *Ulrich v. Ulrich*, 8-409.

Where there is no showing that any testimony was submitted on a part of said issue: *Held*, That in such a case this court will not be able to say that the court below erred in not finding specially, except as to the issues upon which it appears testimony was offered. *Moore v. McIntosh*, 6-43.

Where there are no separate findings of facts and of the law, and the record does not purport to contain all the evidence, this court cannot tell whether every fact necessary to be proved, in order to sustain the general finding, was or was not so proved. *Shelton v. Dunn*, 6-133.

The court may find generally in favor of the plaintiff or defendant, unless requested to do otherwise. *U. P. R. R. v. Horney*, 5-341.

When the issues, both of fact and of law, in a cause are submitted to the decision of the court, and either party desires to except to such decision, upon the questions of law involved in the trial, it is indispensably necessary, in order to make such exception available, that such party shall request, and the court make, separate statements of the facts found, and of the conclusions of law, or that such party shall move for a new trial. *Lacy v. Dunn*, 5-569.

(*Code 1859, § 291.*) If the record shows such final judgment to be erroneous, it is the right of the party aggrieved to have it reversed, vacated or modified, on petition in error to the proper reviewing court. To note an exception to a final judgment in the court which renders it, would seem to be utterly futile. *Koehler v. Ball*, 2-171.

The record in this case failing to show that either party requested such separate finding, and the finding of the court being general, the case is not in a condition to determine whether error was committed or not. *Major v. Major*, 2-338.

TRIAL BY REFEREES.

(4101) **§ 291. Reference of Issue.** All or any of the issues in the action, whether of fact or of law, or both, may be referred, upon the written consent of the parties, or upon their oral consent in court, entered upon the journal.

(Code 1859, § 292.) Where there is an oral submission to referees of a cause, by the parties thereto, and where no terms of submission appear on record, the issue made by the pleadings is presumed to have been submitted. *Bulson v. Lampman*, 1-324.

(4102) **§ 292. Direct Reference.** When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in either of the following cases: Where the trial of an issue of fact shall require the examination of mutual accounts, or when the account is on one side only, and it shall be made to appear to the court that it is necessary that the party on the other side should be examined as a witness to prove the account; in which case the referees may be directed to hear and report upon the whole issue, or upon any specific question of fact involved therein; or where the taking of an account shall be necessary for the information of the court before judgment, in cases which may be determined by the court, or for carrying a judgment into effect; or where a question of fact other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of an action.

Where an action involves "the examination of mutual accounts," it may be referred by the court on its own motion, under § 292. *Galbraith v. McCormick*, 23-707.

Upon a petition for settlement of mutual accounts, in this case no error was committed in ordering a reference. *Williams v. Elliott*, 17-523.

(4103) **§ 293. Trial Before Referee.** A trial before referees is conducted in the same manner as a trial by the court. They have the same power to summon and enforce the attendance of witnesses, to administer all necessary oaths in the trial of the case, and to grant adjournments, as the court, upon such trial. They must state the facts found and the conclusions of law separately, and their decisions must be given, and may be excepted to and reviewed in like manner. The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the referee is to report the facts, the report has the effect of a special verdict.

District court may set aside report of referee, and presumptions will be in favor of action of district court. *Owen v. Owen*, 9-91.

Courts should require referee to give parties time to file exceptions to his report. *DeLong v. Stahl*, 13-558.

Court is not bound by referee's report of conclusions of law. *Martsolf v. Barnwell*, 15-612.

Findings of a referee are as conclusive as findings by a court or jury. *Walker v. Eagle Works*, 8-397.

Referee may find treble damages; suit under ch. 208, C. L. 1862. *Simpson v. Woodward*, 5-571.

Report of referee modified as to costs, no error, none of the evidence being preserved in the record. *Hottenstein v. Conrad*, 9-435.

A general finding for one party is not sufficient; the facts must be found specifically. *Oaks v. Jones*, 11-445.

(4104) **§ 294. Referees, How Chosen.** In all cases of reference, the parties, except when an infant may be a party, may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly; and if the parties do not agree, the court shall appoint one or more referees, not exceeding three, who shall be free from exception.

An order of reference is not a final order, within § 524, code, nor does it determine the action or prevent a judgment, nor is it an order made in a special proceeding; and though it may affect a substantial right, it is not an order involving the merits of the action within the meaning of § 4 of the code amended, (L. 1865, p. 130,) and cannot, therefore, be reviewed by the supreme court, especially not until after final judgment. *Savage v. Challiss*, 4-319.

(4105) **§ 295. Exceptions to Report.** It shall be the duty of the referees to sign any true exceptions taken to any order or decision by them made in the case, and return the same, with their report, to the court making the reference.

(4106) **§ 296. Reference in Vacation.** A judge, in vacation, upon the written consent of the parties, may make an order of reference which the court of which he is a member could make in term time. In such case, the order of reference shall be made on the written agreement of the parties to refer, and shall be filed with the clerk of the court, with the other papers in the case.

(4107) **§ 297. Oath; Referee.** The referees must be sworn or affirmed well and faithfully to hear and examine the cause, and to make a just and true report therein, according to the best of their understanding. The oath may be administered by any person authorized to take depositions.

(4108) **§ 298. Compensation.** The referees shall be allowed such compensation for their services as the court may deem just and proper, which shall be taxed as part of the costs in the case.

EXCEPTIONS.

(4109) **§ 299. Exception Defined.** An exception is an objection to a decision of the court or judge upon a matter of law.

A general exception to sixteen separate and distinct instructions, in the language that "the defendant thereupon excepted to the instructions of the court as given to the jury in this case," is not sufficient as a special exception to a part, or even to the whole of the seventh instruction given by the court to the jury. *State v. Wilgus*, 32-128.

(*Code 1859 § 300.*) The supreme court cannot take notice of alleged errors in the record, unless they are objected or excepted to at the proper time. *Brown v. App*, McC.-174; *Garvey v. Schollkopf*, McC.-179; *Gallaher v. Southwood*, 1-147.

(4110) **§ 300. When Taken.** The party objecting to the decision must except at the time the decision is made, and time may be given to reduce the exception to writing, but not beyond the term. If the decision objected to is made in vacation or at chambers, the judge may give time to reduce the exception to writing, not exceeding ten days.

This court cannot take cognizance of, or consider as a part of the record, a bill of exceptions which is not allowed and authenticated in the manner and within the time prescribed by the statutes. *State v. Burrows*, 33-14.

General exception to a whole charge is insufficient. *State v. Wilgus*, 32-128.

Bill of exceptions must be filed during the term to be of any value. (1-143.) *Kshinka v. Cawker*, 16-65.

It is not necessary to ask that testimony which was objected to when admitted be ruled out. *Tefft v. Wilcox*, 6-54.

(4111) **§ 301. Form of Exception.** No particular form of exception is required. The exception must be stated, with so much of the evidence as is necessary to explain it, and no more, and the whole as briefly as possible.

It is not necessary to ask that testimony which was objected to when admitted be ruled out. *Tefft v. Wilcox*, 6-54.

General exception to a whole charge is insufficient. *State v. Wilgus*, 32-128.

(4112) **§ 302. Exception, How Made.** Where the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing to be noted, at the end of the decision, that he excepts.

Instructions copied into a transcript, without having been made part of the record in the court below, are not part of the record in this court, and

cannot be examined. Entering instructions upon the journal, and noting the exceptions thereto, does not make them part of the record. *McArthur v. Mitchell*, 7-176.

It is not necessary to ask that testimony which was objected to, when admitted, be ruled out. *Tefft v. Wilcox*, 6-54.

(4113) **§303. Exceptions in Writing.** Where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing, and present it to the judge for his allowance. If true, it shall be the duty of the judge to allow and sign it; whereupon it shall be filed with the pleadings as a part of the record, but not spread at large on the journal. If the writing is not true, the judge shall correct it, or suggest the correction to be made, and it shall then be signed as aforesaid.

Entering instructions upon the journal, and noting the exceptions thereto, does not make them part of the record. *McArthur v. Mitchell*, 7-176; *Kshinka v. Cawker*, 16-64.

(*Code 1859, § 304.*) The judge had no power, if consent of counsel had in fact been given, to extend the time for reducing the exceptions to writing beyond the term, for the law forbids it. *Gallaher v. Southwood*, 1-147.

A bill of exceptions filed out of the term is no part of the record. *Brown v. Rhodes*, 1-359.

(4114) **§304. Immaterial Exception.** No exception shall be regarded, unless it is material and prejudicial to the substantial rights of the party excepting.

It must be remembered that, in order to entitle the plaintiff in error to a reversal of the judgment of the court below, he must not only show error, but the error must appear to be material and substantial. *Knox v. Noble*, 25-451.

It is only substantial error that will authorize the reversal of a judgment, and such error must be made to affirmatively appear. *Eastman v. Godfrey*, 15-342.

The court failing to strike out the improper numbering of the causes of action, the error is immaterial under §§ 140 and 304. *Andrews v. Alcorn*, 13-359.

Immaterial error in introducing or receiving evidence will not require a reversal. *K. P. R. R. v. Pointer*, 9-626.

(4115) **§305. Exceptions Withdrawn.** Exceptions taken to the decision of any court of record may, by leave of such court, be withdrawn from the files by the party taking the same, at any time before proceedings in error are commenced.

NEW TRIAL.

(4116) **§306. Causes for New Trial.** A new trial is a re-examination, in the same court, of an issue of fact, after a ver-

dict by a jury, report of a referee, or a decision by the court. The former verdict, report or decision shall be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party: *First*, Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial. *Second*, Misconduct of the jury or prevailing party. *Third*, Accident or surprise, which ordinary prudence could not have guarded against. *Fourth*, Excessive damages, appearing to have been given under the influence of passion or prejudice. *Fifth*, Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property. *Sixth*, That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law. *Seventh*, Newly-discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial. *Eighth*, Error of law occurring at the trial, and excepted to by the party making the application.

No irregularities shown in this case. *Lamme v. Schilling*, 25-95.

This section does not apply to granting new trials in justice's court. (1881.) *Kerner v. Petigo*, 25-657.

New trial not granted on account of bias of jury; application made four years after judgment; and ignorance of petitioner makes no difference, and case pending in supreme court less than one year prior makes no difference. *Soper v. Medberry*, 24-128.

Newly-discovered evidence, merely cumulative, is not a sufficient ground for a new trial; newly-discovered evidence is not ground for a new trial, unless material; new trial will not be granted upon the ground of newly-discovered evidence which the party asking the new trial might, by the exercise of reasonable diligence, have obtained for the first trial. New trial will rarely be granted for new impeaching evidence. *Clark v. Norman*, 24-515.

Motion for new trial filed at the term at which the original trial was had and the original judgment rendered, upon grounds authorized by the statute. It was not filed within three days after the decision of the court, but the court found that the defendant was unavoidably prevented from making an appearance on the day of trial, or from filing the motion for a new trial at an earlier date. This was sufficient. *Hemme v. District*, 30-380.

Where a passenger is wrongfully expelled from the cars, and it appears that while there was a sharp scuffle, some blows given, and some blood drawn, there were no broken limbs or bones, no permanent injury or disfigurement, no long confinement, no protracted pain and suffering, no heavy

expenses for medicine, nursing or physician, little loss of time, not to exceed a day's delay, and no circumstances of outrage and insult independent of the actual expulsion: *Held*, That a verdict awarding \$5,000 damages was excessive. *M. K. & T. R. B. v. Weaver*, 16-456.

Any matter for which a new trial may be granted is waived by neglect of the party to move for a new trial. *Nesbit v. Hines*, 17-319.

Where, after a judgment in an action of ejectment, the defeated party files his motion for a new trial under § 306, which was properly overruled, it is too late for him to make his demand for the first time in the supreme court, under § 599, for a second trial. *Anderson v. Kent*, 14-208.

When the matter comes before the court upon a motion for a new trial, it then becomes the duty of the court to determine for itself whether the verdict is sustained by sufficient evidence or not. *Atyeo v. Kelsey*, 13-217.

Instead of giving the eighth ground, the defendants specifically point out the errors; this should be encouraged. *Marbourg v. Smith*, 11-563.

Motion by defendant for new trial "for error of law occurring at the trial and excepted to by the defendant;" all rulings of the court made during the trial, and excepted to by the defendant at the time they were made, should be again considered by the court. *DaLee v. Blackburn*, 11-191.

Court may set aside report of referee to whom all the issues of law and fact have been referred, and grant new trial. *Owen v. Owen*, 9-91.

An order setting aside a default judgment, and allowing defendant to answer, is not reviewable pending the suit. *McCullough v. Dodge*, 8-476.

(*Code 1859, § 307.*) The record shows that about \$200 of the verdict was rendered for the making of cornice, proved to have been worth fifty cents per foot, but shows no evidence of the quantity of cornice made. New trial should have been granted. *Backus v. Clark*, 1-304.

(4117) § 307. New Trial Not Granted; Damages. A new trial shall not be granted on account of the smallness of the damages, in an action for an injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained.

(4118) § 308. Application; Time. The application for a new trial must be made at the term the verdict, report or decision is rendered; and, except for the cause of newly-discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented.

Motion for new trial filed too late; the objections to it should have been sustained, and, when filed too late, should not be heard with a petition for a new trial, but should be disposed of separately. *McDonald v. Cooper*, 32-60.

A motion for a new trial upon the ground of newly-discovered evidence may be filed whenever the newly-discovered evidence is first discovered,

although such discovery may be many days, or even weeks, or months, after the time when the verdict is rendered; and a party may also file a motion for a new trial after the lapse of more than three days, provided he was unavoidably prevented from filing the same within three days. *Fudge v. St. L. & S. F. R. R.*, 31-148.

Motion for new trial filed eight days after verdict. The plaintiff in error, defendant below, now says that the reason was that the defendant did not wish to file its motion for a new trial until its motion for judgment upon the special findings of the jury had been disposed of. * * * We do not think that this is a sufficient reason. We think the motion was filed too late, and is in effect a nullity. (27-133; 3-80; 11-617; 17-316; 19-150; 21-480; 22-65; 25-652.) *City of Osborne v. Hamilton*, 29-4.

Motion to set aside referee's report. The defendant was too late with his motion. It was not made within three days after the filing of the report, nor at the term at which it was filed. Hence, within § 308, the application was made too late. *Grayson v. Hinkle*, 29-278.

As it is not shown by the record that the motion was filed within the time required by § 308 of the code, and no reason given for delay in the filing of the motion, and as the court overruled the motion upon the hearing thereof, it will be presumed by this court, for the purpose of upholding the judgment of the court below, that the motion was not made in time, and therefore the court below did not err in overruling it. *Hover v. Tenney*, 27-133.

A motion for a new trial, on the ground that the decision is not sustained by sufficient evidence, must be filed during the term of the trial court, and not in vacation. *Earls v. Earls*, 27-541.

(*Code 1859, § 309.*) A motion for a second "new trial" in ejectment is governed by the same rules which govern applications for new trials in other actions; and therefore a motion for such second new trial should be made upon written grounds, filed at the time of making the motion. *Clayton v. School District*, 20-262.

The record must show that the motion for a new trial was made in time. *Lucas v. Sturr*, 21-480.

(*Code 1859, § 309.*) In absence of a showing that the party applying for a new trial, on grounds of, first, irregularity on the part of the court or party, and second, accident or surprise, was "unavoidably prevented" from making the motion before, it is error to hear and grant the motion after the lapse of three days from the rendition of judgment. *Odell v. Sargent*, 3-83.

(4119) **§ 309. Affidavits for New Trial.** The application must be by motion, upon written grounds, filed at the time of making the motion. The causes enumerated in subdivisions two, three and seven, of section three hundred and six, must be sustained by affidavits, showing their truth, and may be controverted by affidavits.

As to this motion, however, no notice is required, and certain of the grounds for a new trial must be sustained by affidavit. The fact that a mo-

tion is filed including those grounds, is notice to the opposite party that affidavits sustaining them will be offered; and a party making a motion is under no obligation to disclose the testimony he may have to offer on the hearing thereof, any more than a party before trial to disclose the testimony he expects to produce on the trial. *Werner v. Edmiston*, 24-150.

Motion for new trial filed too late, therefore the objections to it should have been sustained. *McDonald v. Cooper*, 32-60.

(*Code 1859*, § 310.) A motion for leave to make a motion for a new trial is a nullity. *Odell v. Sargent*, 3-80.

(4120) **§ 310. Petition for New Trial.** Where the grounds for a new trial could not, with reasonable diligence, have been discovered before, but are discovered after the term at which the verdict, report of referee or decision was rendered or made, the application may be made by petition, filed as in other cases, not later than the second term after discovery; on which a summons shall issue, be returnable and served, or publication made, as prescribed in section seventy-four. The facts stated in the petition shall be considered as denied without answer, and if the service shall be complete in vacation, the case shall be heard and summarily decided at the ensuing term, and if in term, it shall be heard and decided after the expiration of twenty days from such service. The case shall be placed on the trial docket, and the witnesses shall be examined in open court, or their depositions taken as in other cases; but no such petition shall be filed more than one year after the final judgment was rendered.

No irregularities shown in this case. *Lamme v. Schilling*, 25-95.

New trial not granted in this case on account of bias of jury, discovered four years after judgment, and it makes no difference if case was pending in the supreme court within less than a year prior to filing petition. *Soper v. Medberry*, 24-135.

Newly-discovered evidence, merely cumulative, is not a sufficient ground for a new trial; newly-discovered evidence is not a sufficient ground for a new trial, unless material; a new trial will not be granted upon the ground of newly-discovered evidence which could have been obtained by reasonable diligence at the first trial; and a new trial will rarely be granted for new impeaching evidence. *Clark v. Norman*, 24-515.

When a plaintiff, upon false and fraudulent testimony, procures a judgment to be rendered against a party not liable for the debt or claim sued upon, and such party has no knowledge of the pendency of the action against him until more than one year after the final judgment was rendered, such judgment may be set aside and annulled, or may be perpetually enjoined. *Adams v. Secor*, 6-542.

(*Code 1859*, § 311.) An application for a new trial, at term subsequent to the one at which the judgment was rendered, must be made by petition. *Odell v. Sargent*, 3-84.

GENERAL PROVISIONS.

(4121) **§ 311. Damages; Recovery.** Whenever damages are recoverable, the plaintiff may claim and recover any rate of damages to which he may be entitled for the cause of action established.

(4122) **§ 312. Provisions Applicable.** The provisions of this article respecting trials by jury apply, so far as they are in their nature applicable, to trials by the court.

(4123) **§ 313. Trial Docket.** A trial docket shall be made out by the clerk of court at least twelve days before the first day of each term of the court, and the actions shall be set for particular days in the order hereinafter stated, and so arranged that the cases set for each day shall be tried as nearly as may be on that day, namely: *First*, Issues of fact to be tried by a jury. *Second*, Issues of fact to be tried by the court. *Third*, Issues of law. If the defendant fails to answer or demur, the cause, for the purpose of this section, shall be deemed to be at issue upon questions of fact; but in every such case the plaintiff may move for and take such judgment as he is entitled to on the defendant's default on or after the day on which said action shall be set for trial. No witnesses shall be subpoenaed in any case while the cause stands upon issue of law; and whenever the court shall regard the demurrer in any case as frivolous, and put in for delay only, no leave to answer or reply shall be given, unless upon payment of all costs then accrued in the action. [L. 1871, ch. 116, § 3 (§ 313, as amended); took effect March 16, 1871.]

We are inclined to agree with the views expressed by the district court, that the order of arrangement prescribed is for the setting of each day rather than for the docket as a whole. But be that as it may, a mistake of the clerk in arranging the docket does not vitiate the setting a case upon any particular day, or render illegal a trial upon the day to which it is assigned. *National Bank v. Wentworth*, 28-189.

The purpose of this section is merely the arrangement of a trial docket—the distribution of cases to particular days. It does not purport to determine what cases are triable, but only declares in what manner triable cases shall be distributed. *Race v. Malony*, 21-36.

A party would not be allowed to recover costs unnecessarily made in subpoenaing witnesses, while the action stands for trial upon issue of law. *Clark v. White*, 17-182.

Evidence given at one term will not be considered at next term, if trial not completed, and case continued. *Butler v. McMillen*, 13-392.

(4124) **§ 314. Order of Trial.** The trial of an issue of fact, and the assessment of damages in any case, shall be in the

order in which they are placed on the trial docket, unless by the consent of the parties or the order of the court they are continued or placed at the heel of the docket, unless the court, in its discretion, shall otherwise direct. The court may, in its discretion, hear at any time a motion, and may by rule prescribe the time for hearing motions. [L. 1871, ch. 116, § 4 (§ 314, as amended); took effect March 16, 1871.]

It is not necessary that cases should be tried arbitrarily in their order, but they may be continued or laid at the end of the docket, or other definite disposition made of them, and subsequent cases then be regularly taken up and tried. *Green v. Bulkley*, 23-134.

Evidently, if, after overruling a frivolous demurrer, the court has power to order the trial to be had at the pending term, it ought to have power to dispose of the case when no defense, not even a frivolous one, is interposed, and we think § 314 gives that power. *Race v. Malony*, 21-37.

(4125) **§ 315. Time; Trial.** Actions shall be triable at the first term of the court after the issues therein by the times fixed for pleading are, or shall have been made up ten days before the term. When issues of law are made up either before or during a term of court, but after the period for preparing the trial docket of such term, the clerk shall place such actions on the trial docket of that term; and when any demurrer shall be adjudged frivolous, the cause shall stand for hearing or trial in like manner as if an issue of fact had been joined in the first instance; but the court may in its discretion fix specially the time when such cause shall stand for trial. [L. 1871, ch. 116, § 5 (§ 315, as amended); took effect March 16, 1871. See L. 1870, ch. 87, § 10.]

It is substantial error to force a defendant, over his objection, to go to trial at a term prior to that at which the action first became triable, and error sufficient to compel a reversal of a judgment rendered against him upon such trial. *Gapen v. Stephenson*, 18-140; *Rice v. Simpson*, 26-146.

We hold that when the issues have been once made up by the filing of pleadings, or the failure to file them, the case is, under said § 315, triable at any term commencing more than ten days thereafter, and any subsequent change in the issues made by filing new or amended pleading, by leave of the court, or consent of the parties, does not render said § 315 again operative and postponement compulsory. *Rice v. Hodge*, 26-168.

By this, actions are triable, although the issues are joined two days after the trial docket is made up. Indeed, as the trial docket is to be made up at least twelve days before the term, it may in fact be made up many days before it is settled what cases are triable; and where a frivolous demurrer is filed during the term, the court may order a trial at the same term. *Race v. Malony*, 21-37.

(*Gen. Stat.*) Evidence given at one term will not be considered at next, if trial not completed, and action continued. *Butler v. McMillen*, 13-392.

Giving the district court power to hold an adjourned term, gives it power not to adjourn from day to day, but to adjourn over a length of time, over intervening obstacles to the holding of court. *State v. Montgomery*, 8-358.

(4126). **§ 316. Continuance.** The court may, for good cause shown, continue an action at any stage of the proceedings, upon such terms as may be just. When a continuance is granted on account of the absence of evidence, it shall be at the cost of the party making the application, unless the court otherwise order.

It is not necessary that cases should be tried arbitrarily in their order. *Green v. Bulkley*, 23-134.

The court had the power to tax the costs to the party applying for the continuance. *Hodgin v. Barton*, 23-744.

Evidence given at one term will not be considered at next, if trial not completed, and action continued. *Butler v. McMillen*, 13-392.

Granting or refusing a continuance under the code is so largely within the discretion of the trial court, that unless it appears that the court has abused its discretion, this court cannot reverse the ruling. *Moon v. Helfer*, 25-144

(4127) **§ 317. Affidavit for Continuance.** A motion for a continuance, on account of the absence of evidence, can be made only upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it, and where the evidence may be; and if it is for an absent witness, the affidavit must show where the witness resides, if his residence is known to the party, and the probability of procuring his testimony within a reasonable time, and what facts he believes the witness will prove, and that he believes them to be true. If, thereupon, the adverse party will consent that on the trial the facts alleged in the affidavit shall be read and treated as the deposition of the absent witness, or that the facts in relation to other evidence shall be taken as proved to the extent alleged in the affidavit, no continuance shall be granted on the ground of the absence of such evidence.

Section 317 of the code, providing that no continuance shall be granted on the ground of the absence of evidence, if the adverse party consent that on the trial the facts alleged in the affidavit shall be read and treated as the deposition of the absent witness, has no application to justices' courts. (1882.) *McGowen v. Campbell*, 28-31.

The granting of a continuance is largely within the discretion of the court. *Hottenstein v. Conrad*, 9-436; *Swenson v. Aultman*, 14-273.

A continuance to the next term passes the case till the regular term. *Sawyer v. Bryson*, 10-199.

Party asking for continuance must show that he used due diligence. *Ed. Assoc'n v. Hitchcock*, 4-36.

On consent to have affidavit for continuance read in evidence, it is proper

to refuse application for continuance. *Thompson v. State*, 5-160; *State v. Dickson*, 6-209.

Trial has been commenced at one term, and continuance till third term. and defendant testifies, and there is no rebutting evidence. The plaintiff cannot inquire into errors in the rulings of the court on the trial at the first term. *Butler v. McMillen*, 13-385.

Application was made for continuance on the ground of absence of the evidence of B. S. By consent of the opposite parties, the affidavit reciting such testimony was received as a deposition, and the application properly overruled. *Rice v. Hodge*, 26-168.

The affidavit in the case was read in evidence, upon the consent of the prosecution that the facts alleged might be read and treated as the depositions of the absent witnesses. Under this agreement, and the law applicable to such cases, (Code, § 317; Crim. Code, § 210,) it should have been read to the jury, and treated by the court as the deposition of the witness therein named. *State v. Roark*, 23-151.

Refusal to instruct the jury that they must treat the testimony set out in an affidavit for continuance in the same manner as if said witnesses had given such testimony from the stand, not error. *State v. White*, 17-491.

The affidavit does not show that the defendant used due diligence to obtain the evidence for which he asked the continuance; and it does not state the evidence itself in any proper manner. The issuing of subpoenas for non-resident witnesses is not diligence. *Payne v. Nat. Bank*, 16-153.

Application for continuance should show the testimony. *Brown v. Johnson*, 14-378.

(4128) § 318. **Trial Docket.** The clerk shall make out a copy of the trial docket for the use of the bar, before the first day of the term of court.

ARTICLE 16—EVIDENCE—COMPETENCY OF WITNESSES.

SEC.

- 319. Who competent generally.
- 320. Laws relating to settlement of estates of deceased persons, etc., not affected.
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(4129) **§ 319. Competent Witness.** No person shall be disqualified as a witness in any civil action or proceeding, by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credibility.

Section 319 of the civil code prescribes the rule as to the competency of witnesses, and §§ 322 and 323 furnish the exceptions, and all that was intended to be accomplished by § 320 was to prevent § 319 from repealing or modifying, by construction or implication, any of the laws then existing relating to the settlement of the estates of deceased persons, or infants, idiots or lunatics, or the attestation of certain instruments; and it was not intended that § 320 should prescribe the rule, or the exceptions, as to the competency or incompetency of witnesses; hence, in an action against an executor of an estate, the executor, the devisee and legatee, and the husband or wife of the devisee or legatee, may be witnesses for some purposes, in favor of the estate, and are competent witnesses in all cases, unless made incompetent by other sections of the statutes than said § 320. *McCartney v. Spencer*, 26-62.

A true construction of subd. 3 of § 323, in connection with § 319, does away with the question of interest on the part of the witness, and only applies when the husband or wife is a party to the action, or where the rights of the other, though not a party to the record, would be concluded by any verdict rendered. The exception so contained in said subdivision of § 323 to the general rule adopted in § 319 should be confined to the terms stated. *Higbee v. McMillan*, 18-136.

In an action where a husband and wife, with others, are parties, and in which the judgment may be rendered for or against any one or more of the plaintiffs or defendants, both husband and wife are competent witnesses for or against any of the parties, except for or against each other. *Ruth v. Ford*, 9-30.

Indian is not incompetent because he does not know the nature of an oath exactly, or the penalties for perjury, but thinks he will be hanged if he tells a lie. *Smith v. Brown*, 8-608.

"If you should be satisfied that any witness in this case has willfully and corruptly testified falsely to any material fact, then it is your duty to disregard the whole of the testimony of such witness," is erroneous instruction, overruling 3-488. *Shellabarger v. Nafus*, 15-547.

Widow, executrix, held to be a competent witness as to all matters except communications between herself and husband during marriage. Adverse party not competent to testify to any transaction had with the deceased. *Jaquith v. Davidson*, 21-341.

(4130) **§ 320. Witness; Preceding Section.** Nothing in the preceding section contained shall, in any manner, affect the laws now existing, relating to the settlement of estates of deceased persons, infants, idiots or lunatics, or the attestation

of the execution of last wills and testaments, or of conveyances of real estate, or of any other instrument required by law to be attested.

All that was intended to be accomplished by § 320, was to prevent § 319 from repealing or modifying, by construction or implication, any of the laws then existing relating to the settlement of the estates of deceased persons or lunatics, or the attestation of certain instruments; and it was not intended that § 320 should prescribe the rule or the exceptions as to the competency or incompetency of witnesses. *McCartney v. Spencer*, 26-62.

Persons who are of unsound mind at the time of their production for examination are incompetent. *Sarbach v. Jones*, 20-500.

(4131) **§ 321. Adverse Party Witness.** Any party to a civil action or proceeding may compel any adverse party or person, for whose benefit such action or proceeding is instituted, prosecuted or defended, at the trial, or by deposition, to testify as a witness in the same manner, and subject to the same rules, as other witnesses.

Adverse party may be compelled to give his deposition, even if he resides in the county of the trial. *In re Abeles*, 12-452.

(4132) **§ 322. Witness Incompetent.** No party shall be allowed to testify in his own behalf, in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir-at-law, next of kin, surviving partner or assignee of such deceased person, where they have acquired title to the cause of action immediately from such deceased person; nor shall the assignor of a thing in action be allowed to testify in behalf of such party concerning any transaction or communication had personally by such assignor with a deceased person in any such case; nor shall such party or assignor be competent to testify to any transaction had personally by such party or assignor with a deceased partner or joint contractor in the absence of his surviving partner or joint contractor, when such surviving partner or joint contractor is an adverse party. If the testimony of a party to the action or proceeding has been taken, and he afterwards die, and the testimony so taken shall be used after his death, in behalf of his executors, administrators, heirs-at-law, next of kin, assignee, surviving partner or joint contractor, the other party, or the assignor, shall be competent to testify as to any and all matters to which the testimony so taken relates.

Evidence offered by widow, in her own behalf, concerning communications which she had personally with her husband in respect to his making of the ante-nuptial agreement, which was objected to, is inadmissible in this case. *Hafer v. Hafer*, 33-463.

The cashier is the executive officer or agent of the financial department of the bank, and in all the duties imposed upon him by law or usage, as such cashier, he acts for the bank and speaks for the bank; but if he dies the bank does not die, and § 322 has no application whatever. *Ellicott v. Barnes*, 31-172.

While a party may not under § 322 of the civil code testify in his own behalf as to any transaction had personally by him with a deceased partner or joint contractor in the absence of his surviving partner or joint contractor, when such surviving partner or joint contractor is an adverse party, yet, if he is called by such adverse party to testify as to part of any such transaction, he may, at his own instance, and in his own behalf, testify as to the whole of such transaction. *Nicolls v. Esterly*, 16-33.

While the action was a contest over the will, the purpose of the proceeding was to defeat the title of the witness and his son given by the will, and thereby have the real estate apportioned among all the heirs-at-law, in accordance with the provisions of the statute relating to descents and distributions. Within the spirit of § 322, the defendant ought not to have been permitted to prove by his own oath the communications of the deceased to him, which perhaps might have been disproved had she been living. *Rich v. Bowker*, 25-11.

Where a motion for a new trial alleges only that the finding and judgment are not sustained by the evidence, and are contrary to law, and the amount of the judgment is in excess of the amount due, all "errors of law occurring at the trial" as to competency of rejected evidence are waived. *Clark v. Imbrie*, 25-425.

This testimony was with respect to certain transactions had between Gladden and James. Since these transactions were had, James died, and the defendants now hold under him, and Gladden transferred his interest to the plaintiff; and hence we think the evidence was incompetent. (28-400.) *Yeamans v. James*, 29-383.

The plaintiff in a suit of replevin having died, the suit was revived in the name of his widow, as executrix. *Held*, That she was a competent witness as to all matters except communications between herself and her husband during marriage: *And further held*, That the adverse party was not competent to testify to any transaction or communication had personally with such deceased plaintiff, no matter in whose presence the same was had. *Jaquith v. Davidson*, 21-341.

Suit by two surviving members of a firm against party, on account for lumber sold; he cannot testify concerning any transaction had personally with the deceased member. *Hook v. Bixby*, 13-170.

This section does not prohibit a party, sued by an administratrix for a debt due the deceased, from testifying as to any question raised by the issues, where such testimony is not in respect to any transaction or communication had personally by such party with the deceased person. *McKean v. Massey*, 9-600.

(*Code 1862*, § 323.) A surviving partner, plaintiff, is a competent witness. In such case defendant may testify as to all matters transpiring since the

death, and as to all respecting which the surviving partner testified, and is competent to authenticate his books of account. *Anthony v. Stinson*, 4-212.

A party to a suit, though the adverse party is the administrator or executor of a deceased person, is competent as a witness in his own behalf to testify to essential facts in issue, not relating to any transaction or communication had personally by the witness with the intestate or testator. *Clary v. Smith*, 20-87.

(4133) § 323. **Incompetent Witness.** The following persons shall be incompetent to testify: *First*, Persons who are of unsound mind at the time of their production for examination. *Second*, Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. *Third*, Husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action; but in no case shall either be permitted to testify concerning any communication made by one to the other during the marriage, whether called while that relation subsisted, or afterwards. *Fourth*, An attorney, concerning any communications made to him by his client, in that relation, or his advice thereon, without the client's consent. *Fifth*, A clergyman or priest concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession. *Sixth*, A physician or surgeon concerning any communication made to him by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by a personal examination of any such patient: *Provided*, That if a person offer himself as a witness, that is to be deemed a consent to the examination; also, if an attorney, clergyman or priest, physician or surgeon on the same subject, within the meaning of the last three subdivisions of this section. [L. 1872, ch. 165, § 1 (§ 323, as amended); took effect March 21, 1872.]

Where an action was commenced on a note and mortgage against J. and wife, and it is alleged that the note and mortgage were each executed by each of the defendants, and apparently they were so executed, and afterward judgment is rendered against J., and afterward a trial is had between the plaintiff and Mrs. J. upon the plaintiff's petition, Mrs. J.'s separate answer, (which put in issue the execution by her of the note and mortgage,) and the plaintiff's reply: *Held*, That J. is not a competent witness to testify on behalf of his wife that she did not execute the note. *Jenkins v. Lewis*, 25-479.

Widow and executrix, plaintiff, held competent as to all matter except communications. *Jaquith v. Davidson*, 21-341.

When, in the absence of the husband from home, the wife acts in protection of property claimed by him, and within the home limits, although without any express direction or agreement, she is acting as his agent, and will be a competent witness in an action by or against him, as to what she does and resists. *Fisher v. Conway*, 21-23.

A witness, after his restoration to sanity, may testify respecting fact which occurred during the period he was under guardianship; and it is for the jury to judge of the credit that is to be given to his testimony. *Sarbach v. Jones*, 20-500.

While the civil code provides that neither the husband nor wife shall, as a witness, furnish evidence concerning confidential communications, yet it does not provide that others who may happen to be possessed of such communications shall not do so. *State v. Buffington*, 20-615.

A wife is a competent witness as to the communications made to a third person by her husband in her presence and hearing, in all civil actions in which the husband is not a party to the suit, when his rights will not be concluded by any verdict therein, and when such communications are themselves admissible in evidence. *Higbee v. McMillan*, 18-136.

(*Gen. Stat.*) In an action where a husband and wife, with others, are parties, and in which the judgment may be rendered for or against any one or more of the plaintiffs or defendants, both husband and wife are competent witnesses for or against any of the parties, except for or against each other. *Ruth v. Ford*, 9-30.

Divorced wife, in an action against her husband and his vendee to set aside a deed to the homestead, because her signature to the deed was obtained by duress, cannot be allowed to testify to threats made to her by her husband while the marriage relation existed. *Anderson v. Anderson*, 9-112.

MEANS OF PRODUCING WITNESSES.

(4134) § 324. **Subpœna.** The clerks of the several courts, and judges of the probate courts, shall, on application of any person having a cause or any matter pending in the court, issue a subpœna for witnesses, under the seal of the court, inserting all the names required by the applicant in one subpœna, which may be served by the sheriff, coroner or any constable of the county, or by the party, or any other person. When a subpœna is not served by the sheriff, coroner or constable, proof of service shall be shown by affidavit; but no costs of service of the same shall be allowed, except when served by an officer.

(4135) § 325. **Subpœna; Contents.** The subpœna shall be directed to the person therein named, requiring him to attend at a particular time and place, to testify as a witness; and it may contain a clause directing the witness to bring with him

any book, writing or other thing, under his control, which he is bound by law to produce as evidence.

When a witness has been subpoenaed to bring a memorandum which is competent evidence, and has it with him on the stand, it is error for the court to refuse to make him produce it as evidence in the case. *Marsh v. Davis*, 33-332.

(4136) **§ 326. Deposition.** When the attendance of the witness, before any officer authorized to take depositions, is required, the subpoena shall be issued by such officer.

(4137) **§ 327. Service of Subpoena.** The subpoena shall be served either by reading or by copy delivered to the witness, or left at his usual place of residence; but such copy need not contain the name of any other witness.

(4138) **§ 328. Attendance; Witness.** A witness shall not be obliged to attend for examination on the trial of a civil action except in the county of his residence, nor to attend to give his deposition out of the county where he resides, or where he may be when the subpoena is served upon him.

There is no provision in the statutes requiring a witness to attend court except upon a subpoena; and no provision authorizing the issuance of a subpoena from the district court of one county to the sheriff of another county; and a witness who attends out of his county is not entitled to mileage. *Mylius v. St. L. Ft. S. & W. Rld.*, 31-234.

(4139) **§ 329. Witness Demanding Fees.** A witness may demand his traveling fees and fee for one day's attendance, when the subpoena is served upon him; and if the same be not paid, the witness shall not be obliged to obey the subpoena. The fact of such demand and non-payment shall be stated in the return.

(4140) **§ 330. Contempt.** Disobedience of a subpoena, or refusal to be sworn or to answer as a witness, or to subscribe a deposition, when lawfully ordered, may be punished as a contempt of the court or officer by whom his attendance or testimony is required.

Where witness is ordered to remain out of the court room, but disobeys the order, his testimony should not be rejected. *Davenport v. Ogg*, 15-363.

Witness subpoenaed to testify before a notary, refusing to give his deposition, may be committed for contempt. *In re Abeles*, 12-451.

(4141) **§ 331. Attachment; Witness.** When a witness fails to attend in obedience to a subpoena (except in case of a demand and failure to pay his fees), the court or officer before whom his attendance is required may issue an attachment to

the sheriff, coroner or constable of the county, commanding him to arrest and bring the person therein named before the court or officer, at a time and place to be fixed in the attachment, to give his testimony and answer for the contempt. If the attachment be not for immediately bringing the witness before the court or officer, a sum may be fixed in which the witness may give an undertaking, with surety, for his appearance; such sum shall be endorsed on the back of the attachment; and if no sum is so fixed and indorsed, it shall be one hundred dollars. If the witness be not personally served, the court may, by a rule, order him to show cause why an attachment should not issue against him.

(4142) **§ 332. Contempt; Punishment.** The punishment for the contempt mentioned in section three hundred and thirty-one, shall be as follows: When the witness fails to attend, in obedience to the subpoena (except in case of a demand and failure to pay his fees), the court or officer may fine the witness in a sum not exceeding fifty dollars. In other cases, the court or officer may fine the witness in a sum not exceeding fifty dollars, or may imprison him in the county jail, there to remain until he shall submit to be sworn, testify or give his deposition. The fine imposed by the court shall be paid into the county treasury, and that imposed by the officer shall be for the use of the party for whom the witness was subpoenaed. The witness shall, also, be liable to the party injured for any damages occasioned by his failure to attend, or his refusal to be sworn, testify or give his deposition.

(4143) **§ 333. Discharge Imprisoned Witness.** A witness so imprisoned by an officer before whom his deposition is being taken, may apply to a judge of a court of record, who shall have power to discharge him, if it appears that his imprisonment is illegal.

(4144) **§ 334. Attachment for Arrest.** Every attachment for the arrest, or order of commitment to prison of a witness by a court or officer, pursuant to this chapter, must be under the seal of the court or officer, if he have an official seal, and must specify, particularly, the cause of arrest or commitment; and if the commitment be for refusing to answer a question, such question must be stated in the order. Such order of commitment may be directed to the sheriff, coroner or any constable of the county where such witness resides, or may be at the time, and shall be executed by committing him to the jail of such county, and delivering a copy of the order to the jailor.

(4145) **§ 335. Examination; Prisoner.** A person confined

to any prison in this state, may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned, but in all other cases his examination must be by deposition.

(4146) **§ 336. Custody.** While a prisoner's deposition is being taken, he shall remain in the custody of the officer having him in charge, who shall afford reasonable facilities for the taking of the deposition.

(4147) **§ 337. Witness Privileged.** A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county, while going, returning or attending, in obedience to a subpoena.

(4148) **§ 338. Fees, Demanding.** At the commencement of each day after the first day, a witness may demand his fees for that day's attendance, in obedience to a subpoena; and if the same be not paid, he shall not be required to remain.

(4149) **§ 339. Oath.** Before testifying, the witness shall be sworn to testify the truth, the whole truth, and nothing but the truth. The mode of administering an oath shall be such as is most binding on the conscience of the witness. An interpreter may be sworn to interpret truly, whenever necessary.

Witness cannot testify unless he will take the oath or affirm. *Mayberry v. Sivey*, 18-295.

MODE OF TAKING THE TESTIMONY OF WITNESSES.

(4150) **§ 340. Mode of Taking Testimony.** The testimony of witnesses is taken in three modes: *First*, By affidavits. *Second*, By deposition. *Third*, By oral examination.

(4151) **§ 341. Affidavit Defined.** An affidavit is a written declaration, under oath, made without notice to the adverse party.

Verification of petition for injunction. "Who, being sworn according to law, depose and say, that the said several matters and things set forth in the foregoing petition are, according to the best of their knowledge, information and belief, true in substance and in fact, except as to such matters stated on information and belief, and as to such statements affiants believe them to be true. * * * Sworn and subscribed before me, this 5th day of May, A. D. 1866. R. L. PEASE, *Notary Public*"—is not a good affidavit, and injunction granted on such a verified petition, used as an affidavit, will be vacated. *Atchison v. Bartholow*, 4-139.

(4152) **§ 342. Deposition Defined.** A deposition is a written declaration, under oath, made upon notice to the adverse party, for the purpose of enabling him to attend and cross-examine, or upon written interrogatories.

(4153) **§ 343. Oral Examination.** An oral examination is an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness.

AFFIDAVITS.

(4154) **§ 344. Affidavit Used for What.** An affidavit may be used to verify a pleading, to prove the service of a summons, notice or other process in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, or in any other case permitted by law.

(4155) **§ 345. Before Whom.** An affidavit may be made in and out of this state, before any person authorized to take depositions, and must be authenticated in the same way, except as provided for the verification of pleadings.

DEPOSITIONS.

(4156) **§ 346. Deposition.** The deposition of any witness may be used only in the following cases: *First*, When the witness does not reside in the county where the action or proceeding is pending, or is sent for trial by change of venue, or is absent therefrom. *Second*, When, from age, infirmity or imprisonment, the witness is unable to attend court, or is dead. *Third*, When the testimony is required upon a motion, or in any other case where the oral testimony of the witness is not required.

No witness is required to attend the district court unless he has been regularly subpoenaed; and no subpoena can be regularly issued or served upon him for such a purpose except a subpoena from his own county, and he is not required to attend the district court, or to give his evidence, except in his own county, and no mileage fees will be allowed him in attending upon court beyond his own county. *Mylius v. St. L. Ft. S. & W. R. R.*, 31-235.

The deposition of a witness can never be used as evidence, except where the oral testimony of the witness cannot be procured, or where the oral testimony of the witness is not required. *Fullenwider v. Ewing*, 30-22.

If the plaintiff can prove his claim in the probate court without the aid of depositions, or if his claim is admitted, he does not need to take depositions; but if he cannot prove his claim without the aid of depositions, and the administrator will not admit his claim, nor consent in writing that depositions may be taken, then the plaintiff, after his claim has been disallowed in the probate court, must take an appeal to the district court, where he can take depositions, under §§ 346-362 of the civil code. *Case v. Huey*, 26-556.

Adverse party may be compelled to give his deposition, even if he resides in the county of the trial. *In re Abeles*, 12-452.

(4157) **§ 347. When Deposition May be Taken.** Either party may commence taking testimony by deposition at any time after service upon the defendant.

When the holder of a claim does in fact take deposition by giving notice to the administrator, under §§ 346, 347, 352, but takes the same without the consent of the administrator, and in his absence: *Held*, That such depositions are invalid. *Case v. Huey*, 26-553.

OFFICER WHO MAY TAKE THEM.

(4158) **§ 348. Before Whom.** Depositions may be taken in this state before a judge or clerk of a court of record, before a county clerk, justice of the peace, notary public, mayor or chief magistrate of any city or town corporate, or before a master commissioner, or any person empowered by a special commission; but depositions taken in this state, to be used therein, must be taken by an officer or person whose authority is derived within the state.

Affidavit verifying the petition, made before the attorney of the plaintiff, is unauthorized. *Warner v. Warner*, 11-123.

(4159) **§ 349. Deposition Taken Out of State.** Depositions may be taken out of this state by a judge, justice or chancellor of any court of record, a justice of the peace, notary public, mayor or chief magistrate of any city or town corporate, a commissioner appointed by the governor of this state to take depositions, or any person authorized by a special commission from this state.

Verification of petition before attorney of plaintiff is unauthorized. *Warner v. Warner*, 11-123.

(4160) **§ 350. Officer Interested.** The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding.

(4161) **§ 351. Commission to Take Deposition.** Any court of record of this state, or any judge thereof, is authorized to grant a commission to take depositions within or without the state. The commission must be issued to a person or persons therein named, by the clerk, under the seal of the court granting the same; and depositions under it must be taken upon written interrogatories, unless the parties otherwise agree.

MANNER OF TAKING AND AUTHENTICATING THEM.

(4162) **§ 352. Notice to Take Deposition.** Prior to the taking of any deposition, unless taken under a special commission, a written notice, specifying the action or proceeding, the

name of the court or tribunal in which it is to be used, and the time and place of taking the same, shall be served upon the adverse party, his agent or attorney of record, or left at his usual place of residence. The notice shall be served so as to allow the adverse party sufficient time, by the usual route of travel, to attend, and one day for preparation, exclusive of Sunday and the day of service; and the examination may, if so stated in the notice, be adjourned from day to day.

Where the holder of a claim does in fact take depositions by giving notice to the administrator, under §§ 346, 347, 352, but takes the same without the consent of the administrator and in his absence: *Held*, That such depositions are invalid, such depositions being taken while the claim is pending in the probate court. *Swayze v. Wade*, 26-555.

It is error to take a deposition under a notice entitled in two distinct cases; but where both cases are between the same parties, this court will presume, in the absence of proof to the contrary, that it was shown to the court below that both cases were upon the same matter, and therefore the error may be disregarded, as not affecting substantial rights. *Laithe v. McDonald*, 7-254.

(4163) **§ 353. Notice by Publication.** When the party against whom the deposition is to be read is absent from or a non-resident of the state, and has no agent or attorney of record therein, he may be notified of the taking of the deposition by publication. The publication must be made three consecutive weeks, in some newspaper printed in the county where the action or proceeding is pending, if there be any printed in such county, and if not, in some newspaper printed in this state, of general circulation in the county. The publication must contain all that is required in a written notice, and may be proved in the manner prescribed for service by publication at the commencement of the action.

(4164) **§ 354. Deposition; Written.** The deposition shall be written in the presence of the officer taking the same, either by the officer, the witness or some disinterested person, and subscribed by the witness.

(4165) **§ 355. Sealed, Indorsed, etc.** The deposition, so taken, shall be sealed up and indorsed with the title of the cause and the name of the officer taking the same, and by him addressed and transmitted to the clerk of the court where the action or proceeding is pending. It shall remain under seal until opened by the clerk by order of the court, or at the request of a party to the action or proceeding, or his attorney.

Where a deposition is received by the clerk nearly a month before the trial, and opened and used by the parties on a motion three days before the trial, and kept with the papers of the case during those three days, and in-

dorsed on the day it was received as "received," but not as "filed;" *Held*, That the deposition, if otherwise regular, should have been admitted in evidence. *Hogendobler v. Lyon*, 12-276.

(4166) **§ 356. Deposition; Evidence.** The depositions taken pursuant to this article shall be admitted in evidence on the trial of any civil action or proceeding, pending before any justice of the peace, mayor or other judicial officer, arbitrator or referee.

(4167) **§ 357. May be Read.** When a deposition has been once taken, it may be read in any stage of the same action or proceeding, or in any other action or proceeding upon the same matter between the same parties, subject, however, to all such exceptions as may be taken thereto under the provisions of this article.

(4168) **§ 358. Authentication of Depositions.** Depositions taken pursuant to this article, by any judicial or other officer herein authorized to take depositions, having a seal of office, whether resident in this state or elsewhere, shall be admitted in evidence, upon the certificate and signature of such officer, under the seal of the court of which he is an officer, or his official seal; and no other or further act of authentication shall be required. If the officer taking the same have no official seal, the deposition, if not taken in this state, shall be certified and signed by such officer, and shall be further authenticated, either by parol proof, adduced in court, or by the official certificate and seal of any secretary or other officer of the territory keeping the great seal thereof, or of the clerk or prothonotary of any court having a seal, attesting that such judicial or other officer was, at the time of taking the same, duly qualified, and acting as such officer. But if the deposition be taken within this state by an officer having no seal, or within or without this state under a special commission, it shall be sufficiently authenticated by the official signature of the officer or commissioner taking the same.

(4169) **§ 359. Certificate of Officer.** The officer taking the deposition shall annex thereto a certificate, showing the following facts: That the witness was first sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition was reduced to writing by some proper person, naming him; that the deposition was written and subscribed in the presence of the officer certifying thereto; that the deposition was taken at the time and place specified in the notice.

(4170) **§ 360. Not Read if Witness Can be Had.** When a deposition is offered to be read in evidence, it must appear

to the satisfaction of the court that, for any cause specified in section three hundred and forty-six, the attendance of the witness cannot be procured.

The deposition of a witness can never be used as evidence, except where the oral testimony of the witness cannot be procured, or where the oral testimony of the witness is not required, and an affidavit can never be used as evidence where a deposition cannot be so used; and in many cases an affidavit cannot be used where a deposition may be used. *Fullenwider v. Ewing*, 30-22.

(4171) **§ 361. Filing Deposition.** Every deposition intended to be read in evidence on the trial, must be filed at least one day before the day of trial.

The rule in regard to the computation of time is not to exclude both the day on which the notice is served, and the day on which the act is to be performed, but to exclude the one and include the other. This distinction may be important in determining when depositions must be filed. *Dougherty v. Porter*, 18-209.

The omission of the clerk to note the *fact* of filing should not deprive the party of the right to use his testimony. *Hogendobler v. Lyons*, 12-281.

(4172) **§ 362. Fees of Officer.** The following fees shall be allowed for taking depositions in this state, viz.: Swearing each witness, ten cents; for each subpoena, attachment or order of commitment, fifty cents; for each hundred words contained in such deposition and certificate, fifteen cents, and no more; and such officer may retain the same until such fees are paid; such officer shall also tax the costs of the sheriff or other officer who shall serve the process aforesaid, and fees of the witnesses, and may, also, if directed by the person entitled thereto, retain such deposition until the said fees are paid.

EXCEPTIONS TO DEPOSITIONS.

(4173) **§ 363. Exceptions to Depositions.** Exceptions to depositions shall be in writing, specifying the grounds of objection, and filed with the papers in the cause.

Depositions must be taken at the time designated, or good reason for continuing the taking shown. *Kisskadden v. Grant*, 1-328.

Objection to incompetency of witness giving deposition should be made at trial. *Johnson v. Matthews*, 5-118.

Objection to deposition, except for incompetency or irrelevancy, must be in writing, and filed before the commencement of the term. *K. P. R. R. v. Pointer*, 9-627.

(4174) **§ 364. Filing Exceptions.** No exception other than for incompetency or irrelevancy shall be regarded, unless made and filed before the commencement of the trial.

Whether the defendant had used due diligence to obtain a continuance was a matter to the court, preceding the argument, to permit the affidavit to be read as a deposition, and after such agreement the question of diligence was immaterial. *State v. Roark*, 23-151.

Objection to deposition, except for incompetency or irrelevancy, must be in writing, and filed before the commencement of the term. *K. P. R. R. v. Pointer*, 9-627.

From this section it is fairly inferable that the objection for incompetency and irrelevancy may be made at any time during the trial, and could not properly be made at any other time. *Johnson v. Matthews*, 5-125.

(4175) **§ 365. Questions Before Trial on Exceptions.** The court shall, on motion of either party, hear and decide the questions arising on exceptions to depositions, before the commencement of the trial.

(4176) **§ 366. Errors Waived.** Errors of the court, in its decisions upon exceptions to depositions, are waived, unless excepted to.

ADMISSION, INSPECTION, PRODUCTION AND PROOF OF DOCUMENTS.

(4177) **§ 367. Admission of Writings.** Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper or document material to the action, and request an admission, in writing, of its genuineness. If the adverse party, or his attorney, fail to give the admission in writing within four days after the request, and if the party exhibiting the paper or document be afterward put to any cost or expense to prove its genuineness, and the same be finally proved or admitted on the trial, such costs and expenses, to be ascertained at the trial, shall be paid by the party refusing to make the admission, unless it shall appear to the satisfaction of the court that there were good reasons for the refusal.

(4178) **§ 368. Inspection of Books, etc.** Either party, or his attorney, may demand of the adverse party an inspection and copy, or permission to take a copy, of a book, paper or document in his possession or under his control, containing evidence relating to the merits of the action or defense therein. Such demand shall be in writing, specifying the book, paper or document with sufficient particularity to enable the other party to distinguish it, and if compliance with the demand, within four days, be refused, the court or judge, on motion and notice to the adverse party, may, in their discretion, order the adverse party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of such book, paper or document; and on failure to comply with such order, the court may exclude the paper or document from being

given in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as the party, by affidavit, alleges it to be. This section is not to be construed to prevent a party from compelling another to produce any book, paper or document when he is examined as a witness.

Where a defendant has been served with a subpoena *duces tecum*, and has with him the desired memorandum on the stand when testifying, which is competent evidence, it is error for the court to refuse to make him produce it. *Marsh v. Davis*, 33-332.

If the defendant relies upon a written or printed warranty, no oral evidence of it is permissible, unless the warranty is lost or the plaintiff refuse to give to the defendant an inspection or copy thereof, upon demand, as provided for in § 368 of the code. *McCormick v. Roberts*, 32-73.

The court, upon motion, and notice to the defendant, and sufficient evidence of proper demand and refusal, will order said defendant to give to said counsel for the plaintiff within a specified time an inspection and copy, or permission to take a copy of county records within the custody of defendant. *State v. Allen*, 5-214.

This section does not apply to copies obtained from the public records, equally accessible to all the parties. *Hammerslough v. Hackett*, 30-64.

(4179) **§ 369. Copies of Writings.** Either party, or his attorney, if required, shall deliver to the other party, or his attorney, a copy of any deed, instrument or other writing whereon the action or defense is founded, or which he intends to offer in evidence at the trial. If the plaintiff or defendant shall refuse to furnish the copy or copies required, the party so refusing shall not be permitted to give in evidence, at the trial, the original of which a copy has been refused. This section shall not apply to any paper, a copy of which is filed with a pleading.

This section does not apply to copies obtained from the public records, equally accessible to all the parties. *Hammerslough v. Hackett*, 30-64.

Under §§ 368, 369, the defendants could have obtained a copy of the plaintiff's tax deed, provided they had the slightest suspicion that he held or claimed to hold under any such tax deed; or, if the plaintiff had failed to furnish a copy to the defendants, after a proper demand therefor under said sections, then the defendants could have excluded it from being introduced in evidence on the trial. *Board v. Linscott*, 30-266.

(4180) **§ 370. Laws of other States.** Printed copies in volumes of statutes, codes or other written law, enacted by any other state or territory, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts or tribunals of such state, territory or gov-

ernment, shall be admitted by the courts and officers of this state, on all occasions, as presumptive evidence of such laws. The unwritten or common law of any other state, territory or foreign government, may be proved as facts by parol evidence; and the books of reports of cases adjudged in their courts, may also be admitted as presumptive evidence of such law.

We cannot take judicial notice of the constitution or laws or judicial decisions of any other state. They must be proved by the introduction of evidence. *Hunter v. Ferguson*, 13-475.

It seems that the attestation of a foreign record, under § 905 of the Revised Statutes of the United States, must be made by the clerk in person, and cannot be made by a deputy or other person acting as a substitute for him. *K. P. R. R. v. Cutter*, 19-83.

Our courts will not take judicial notice of the laws of Missouri, nor of any other state except our own. Such laws must be proved by the introduction of evidence. *Porter v. Wells*, 6-455.

(4181) **§ 371. Authentication of Copies of Records, etc.** Copies of records and proceedings in the courts of a foreign country may be admitted in evidence, upon being authenticated as follows: *First*, By the official attestation of the clerk or officer in whose custody such records are legally kept; and, *Second*, By the certificate of one of the judges or magistrates of such court, that the person so attesting is the clerk or officer legally intrusted with the custody of such records, and that the signature to his attestation is genuine; and, *Third*, By the official certificate of the officer who has the custody of the principal seal of the government under whose authority the court is held, attested by said seal, stating that such court is duly constituted, specifying the general nature of its jurisdiction, and verifying the seal of the court.

Now, if neither the act of congress providing for the authentication of judicial records and proceedings, nor § 377 of the civil code, applies to the authentication of records made by justices of the peace in sister states, then § 371 of our civil code must apply; for otherwise we would have no mode of proving records of justices of the peace of sister states, except the old common-law mode; and just what that mode is, is not very well settled or defined. We think that said § 371 of the civil code is applicable; that the same person may be the judge and the clerk of the same court, and may certify its proceedings in each capacity, we think has been settled beyond controversy. *Case v. Huey*, 26-560.

It seems that the attestation of a foreign record, under § 905 of the Revised Statutes of the United States, must be made by the clerk in person, and cannot be made by a deputy or other person acting as a substitute for him. *K. P. R. R. v. Cutter*, 19-86.

(4182) **§ 372. Copies of Recorded Papers.** Copies of all

papers authorized or required by law to be filed or recorded in any public office, or of any record required by law to be made or kept in any such office, duly certified by the officer having the legal custody of such paper or record, under his official seal, if he have one, may be received in evidence with the same effect as the original, when such original is not in the possession or under the control of the party desiring to use the same.

Before parol secondary evidence of the contents of any paper can be used, the testimony of the person who is shown to have been the last custodian of such paper, or who is presumed in law or from the circumstances of the case to be such custodian, must be introduced to show the loss or destruction of such paper, if such testimony can be produced. *Brock v. Cottingham*, 23-389.

The statute requires the county treasurer to keep a record of tax sales and redemptions, and a certified copy of that record would be evidence of the facts therein stated. But mere oral testimony that certain facts are shown by such record, whether given by the officer in charge of the records, or any other party, is not the best evidence, and is incompetent. *Downing v. Haxtun*, 21-179.

A record copy of deed of assignment admissible, when the defendant, a grantee of the assignee, testifies that the original is not in his possession nor under his control. *Marshall v. Shibley*, 11-117.

(4183) **§ 373. Statute Books.** The printed statute books of this state, or of the territory of Kansas, printed under authority, shall be evidence of the private acts therein contained.

(4184) **§ 374. Copies of Laws, etc.** Copies of any act, law or resolution contained in the printed statute books of the states and territories of the United States, purporting to be printed by authority, and which are now or may be hereafter deposited in the office of the secretary of this state, and required by law to be kept there, certified under the hand and seal of office of the secretary of this state, shall be admitted as evidence.

(4185) **§ 375. Acts of Congress Evidence.** The printed books containing the acts of the congress of the United States, purporting to be published by authority of congress, or by authority of the United States, shall be evidence of the laws, public or private, general, local or special, therein contained.

(4186) **§ 376. Public Documents Evidence.** Public documents, purporting to be edited or printed by authority of congress, or either house thereof, shall be evidence to the same extent that authenticated copies of the same would be.

(4187) **§ 377. Justice of Peace; Records.** Copies of proceedings before justices of the peace, certified by the justice be-

fore whom the proceedings are had, shall be evidence of such proceedings.

We think this section has application only to domestic judgments—only to judgments rendered in the state of Kansas. *Case v. Huey*, 26-559.

(4188) **§ 378. Records of Justice Out of Office.** Copies of proceedings had before a justice of the peace, where such justice is out of office, certified by the justice who is in possession of the docket and papers of such justice, shall be received in evidence in any court in this state.

(4189) **§ 379. Ordinances, etc., Evidence.** Printed copies of the ordinances, resolutions, rules, orders and by-laws of any city or incorporated town in this state, published by authority of such city or incorporated town, and manuscript copies of the same, certified under the hand of the proper officer, and having the corporate seal of such city or town affixed thereto, shall be received as evidence.

Parol evidence of city ordinance competent when the city failed to provide book for recording same, and the original slips showing minutes of council proceedings, kept by the clerk, are also competent. *City of Troy v. A. & N. Rld.*, 11-519.

The court cannot judicially take notice of existence of city ordinance. *Anthony v. Halderman*, 7-69.

(*Laws 1867, p. 121.*) The official acts of the city council can be proved only by the records of their proceedings, or otherwise, as provided by statute. *City of Topeka v. Tuttle*, 5-322.

(4190) **§ 380. Evidence; Marriages.** When, by ordinance or custom of any religious society or congregation in this state, a register is required to be kept of marriages, births, baptisms, deaths or interments, such register shall be admitted as evidence.

(4191) **§ 381. Marriage Register.** Copies of the register referred to in the preceding section, certified by the pastor or other head of any such society or congregation, or by the clerk or other keeper of such register, and verified by his affidavit in writing, shall be received in evidence.

(4192) **§ 382. Translation; Writing.** Whenever any written evidence in a cause shall be in a language other than the English, a written translation thereof, in the English language, made by a competent translator, and verified by his affidavit, may be read in evidence instead of the original, if such original be competent evidence.

(4193) **§ 383. Receipt of Receiver; Effect.** The usual duplicate receipt of the receiver of any land office, or, if that be lost

or destroyed, or beyond the reach of the party, the certificate of such receiver that the books of his office show the sale of a tract of land to a certain individual, is proof of title equivalent to a patent against all but the holder of an actual patent.

(4194) **§ 384. Papers Deposited with Register or Receiver.** Copies of all papers and documents, lawfully deposited in the office of the register or receiver of any land office of the United States within this state, and copies of any official letter or communication, received by the register or receiver of any such land office, from any department of the government of the United States, when duly certified by the register or receiver having the custody of such paper, document, letter or other official communication, shall be received in evidence in the same manner and with like effect as the originals.

(4195) **§ 385. Exemplifications.** Exemplifications from the books of any of the departments of the government of the United States, or of any papers filed therein, shall be admitted in evidence in the same manner and with like effect as the originals, when attested by the officer having the custody of such originals.

(4196) **§ 386. Signature of Officer.** The signature of the officer to any certificate or document hereinbefore mentioned, shall be presumed to be genuine until the contrary is shown.

(4197) **§ 387. Account Books; Evidence.** Entries in books of account may be admitted in evidence, when it is made to appear by the oath of the person who made the entries, that such entries are correct, and were made at or near the time of the transaction to which they relate, or upon proof of the handwriting of the person who made the entries, in case of his death or absence from the county.

The evidence of these books of account seems to have been brought clearly within § 387 of the code of civil procedure. The only one in respect to which there could be any doubt was that of J. G. N., and the objection to this is, that it was not a book of general entries. It appears that the first entries of sales were made in a little pass-book or blotter, and from that copied into the journal which was offered in evidence. These copies were generally made at the close of each day, though one of the witnesses says there was sometimes a delay of a day or two before they were transcribed. These original pass-books had been lost or destroyed, and the journal was admitted as evidence. We do not think the court erred in admitting this evidence. *Rice v. Hodge*, 26-171.

(4198) **§ 387a. Records and Books.** The books and records required by law to be kept by any probate judge, county

clerk, county treasurer, register of deeds, clerk of the district court, justice of the peace, police judge, or other public officers, may be received in evidence in any court; and when any such record is of a paper, document, or instrument authorized to be recorded, and the original thereof is not in the possession or under the control of the party desiring to use the same, such record shall have the same effect as the original; but no public officer herein named or other custodian of public records, shall be compelled to attend any court, officer or tribunal sitting more than one mile from his office with any record or records belonging to his office or in his custody as such officer. [L. 1870, ch. 87, § 12; took effect May 12, 1870.]

Custodian of paper must be introduced to show its loss, before secondary evidence of its contents can be produced. *Brock v. Cottingham*, 23-389.

PROCEEDINGS TO PERPETUATE TESTIMONY.

(4199) **§ 388. Perpetuating Evidence.** The testimony of a witness may be perpetuated in the manner hereinafter provided.

(4200) **§ 389. Petition.** The applicant shall file in the office of the clerk of the district court a petition, to be verified, in which shall be set forth, specially, the subject-matter relative to which testimony is to be taken, and the names of the persons interested, if known to the applicant; and if not known, such general description as he can give of such persons, as heirs, devisees, alienees or otherwise. The petition shall also state the names of the witnesses to be examined, and the interrogatories to be propounded to each; that the applicant expects to be a party to an action in a court of this state, in which such testimony will, as he believes, be material, and the obstacles preventing the immediate commencement of the action, where the applicant expects to be plaintiff.

(4201) **§ 390. Examination of Witnesses.** The court, or a judge thereof, in vacation, may forthwith make an order allowing the examination of such witnesses. The order shall prescribe the time and place of the examination, how long the parties interested shall be notified thereof, and the manner in which they shall be notified.

(4202) **§ 391. Cross-Interrogatories.** When it appears satisfactorily to the court or judge that the parties interested cannot be personally notified, such court or judge shall appoint a competent attorney to examine the petition, and prepare and file cross-interrogatories to those contained therein. The witnesses shall be examined upon the interrogatories of the

applicant, and upon cross-interrogatories, where they are required to be prepared, and no others shall be propounded to them; nor shall any statement be received which is not responsive to some one of them. The attorney filing the cross-interrogatories shall be allowed a reasonable fee therefor, to be taxed in the bill of costs.

(4203) **§ 392. Depositions.** Such depositions shall be taken before some one authorized by law to take depositions, or before some one specially authorized by the court or judge, and shall be returned to the office of the clerk of the court in which the petition was filed.

(4204) **§ 393. Deposition Approved and Filed.** The court or judge, if satisfied that the depositions have been properly taken, and as herein required, shall approve the same and order them to be filed; and if a trial be had between the parties named in the petition, or their privies or successors in interest, such depositions, or certified copies thereof, may be given in evidence by either party, where the witnesses are dead or insane, or where attendance for oral examination cannot be obtained or required; but such depositions shall be subject to the same objections for irrelevancy and incompetency as may be made to depositions taken pending an action.

(4205) **§ 394. Costs.** The applicant shall pay the costs of all such proceedings.

ARTICLE 17—JUDGMENT.

SEC.

- 395. Judgment, what is.
- 396. May be given for or against whom, etc.
- 397. Action may be dismissed without prejudice, in what cases.
- 398. When defendant may proceed to trial, although plaintiff may have failed to appear, etc.
- 399. Mortgaged property to be sold.
- 400. Judgment for conveyance, etc., to operate as such; sheriff may be ordered to execute conveyance.
- 401. How account may be taken, proof heard, and damages assessed.

JUDGMENT BY CONFESSION.

- 402. Defendant may confess judgment.
- 403. Judgment may be entered upon confession by an authorized attorney.

SEC.

- 404. Pleadings in such cases.
- 405. Affidavit of defendant.
- 406. Execution; confession a release of errors.
- 407. Warrant of attorney to be produced, etc.
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MANNER OF GIVING AND ENTERING JUDGMENT.

- 409. Judgment to conform to verdict.
- 410. Judgment on special verdict, or case reversed.
- 411. Judgment contrary to the verdict.
- 412. For defendant, in cases of counter-claim, set-off, etc.
- 413. Against infants.
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SEC.

415. Record to be made, when.
 416. When to be made up and signed.
 417. Shall consist of what.
 418. Further time to complete record;
 judge to sign.

SEC.

419. Judgment a lien on real estate,
 from what time; may be entered,
 and be a lien in another court;
 execution shall be issued, from what court.

(4206) **§ 395. Judgment Defined.** A judgment is the final determination of the rights of the parties in an action.

A final judgment is one which finally decides and disposes of the whole merits of the case, and reserves no further question or directions for the future judgment of the court. *Brown v. Galena Mining Co.*, 32-531.

The code declares that a judgment is the final determination of the rights of the parties in an action. Now, this action is finally determined, and all rights of either party therein adjudicated, by the dismissal without prejudice in the absence of the plaintiff, and an appeal will lie to the district court from such a judgment. *Moore v. Toennisson*, 28-610.

It has been the common practice in this state, in a case tried to the court without a jury, for the parties to produce their evidence and submit the case to the court at one term, and for the court to take the evidence and arguments under advisement to the next or succeeding term. *Tarpenning v. Cannon*, 28-667.

An order of a justice discharging an attachment is not a final judgment. *Butcher v. Taylor*, 18-560.

The final determination of an action, whether it be by proceedings formerly known as equitable or at common law, is by our code a judgment. *State v. McArthur*, 5-281.

(4207) **§ 396. Judgment; Parties.** Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment may be proper. The court may also dismiss the petition with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or proceed in the cause against the defendant or defendants served.

When the attachment was issued and served by giving proper notice, including the notice to the garnishee, the firm creditor obtained a lien upon the fund of the member then in the hands of the garnishee, and this lien cannot be destroyed by any subsequent action, or subsequent attachment, or subsequent garnishment proceedings, by any creditor of such individual member of the partnership. *Fullam v. Abrahams*, 29-728.

An attachment would lie against all the members of a copartnership, where the grounds for the attachment would apply to all of them; and it would lie against any single member of the copartnership where the grounds for the attachment would apply to him alone, or to him and others. *Williams v. Mutherspaugh*, 29-733.

(*Code 1859, § 381.*) When judgment has been rendered against one of several defendants served, the plaintiff may proceed against those defendants not served by another summons, but the right so to proceed is discretionary with the court, under § 381, and the court will exercise its control over the proceedings, whenever it will inconvenience the administration of justice or prejudice the opposite party. *Robinson v. Kinney*, 2-184.

The surety may prove he is released by an indulgence granted to the principal. *Rose v. Williams*, 5-490.

The court is authorized to render a judgment against one of the defendants in ejectment, and leave the action to proceed against the other. *Burton v. Boyd*, 7-30.

Plaintiff may dismiss his action against the defendants not liable and take judgment against the others. *Silvers v. Foster*, 9-60; *Alvey v. Wilson*, 9-405.

During the trial the name of one of the plaintiffs, on motion of the plaintiffs, may be stricken out, and the action may proceed. *K. P. R. R. v. Nichols*, 9-235.

(4208) **§ 397. Dismissal of Action.** An action may be dismissed, without prejudice to a future action: *First*, By the plaintiff, before the final submission of the case to the jury, or to the court, where the trial is by the court. *Second*, By the court, where the plaintiff fails to appear on the trial. *Third*, By the court, for the want of necessary parties. *Fourth*, By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence. *Fifth*, By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action. *Sixth*, In all other cases, upon the trial of the action, the decision must be upon the merits.

The code declares that a judgment is the final determination of the rights of the parties in an action. Now this action is finally determined, and all rights of either party therein adjudicated, by the dismissal without prejudice in the absence of the plaintiff. Such a disposition is specially provided for in the article of the code concerning judgments, and an appeal will lie from such an order. *Moore v. Toennisson*, 28-610.

Action dismissed. *Allen v. Douglass*, 29-415.

Action to foreclose mortgage may be dismissed without prejudice to a future action, before the case is called for trial, notwithstanding counterclaim has been filed; and defendant may have trial of his claim. *Amos v. Loan Association*, 21-474.

That discretionary power which a trial court possesses, enables it to dis-

pose of a case, even after its instructions are finished, in such way as to preserve the future rights of the parties. The statutory right of the plaintiff to dismiss without prejudice may have ceased, but the discretionary power and control of the court over proceedings before it is not ended, and it may even then open the case for further testimony or further argument. (14-548) It may also, if the interests of justice require, permit a dismissal without prejudice. *Mason v. Ryus*, 26-467.

The court, after sustaining a demurrer to evidence interposed by the defendant, and before rendering any judgment thereon, may, in its discretion, allow the plaintiff to dismiss his action without prejudice. *Schafer v. Weaver*, 20-297.

Plaintiff in a replevin suit may dismiss the action without prejudice at any time before final submission, and if he has obtained possession of the property the defendant may have his rights determined. *McVey v. Burns*, 14-292.

If the plaintiff fails to comply with an order directing him to separately number the counts of his petition, the court may dismiss the action. *Board v. Hoaglin*, 5-558.

(*Code 1859, § 382.*) Transfer of note for valuable consideration without written indorsement will enable holder to sue in his name, and a dismissal by the court prejudiced the rights of plaintiff. *Williams v. Norton*, 3-295.

(*Code 1859, § 382.*) In all but five enumerated cases the decision must be on the merits. The court is nowhere in the code authorized to dismiss a suit upon the application of the defendant for want of sufficient proof, or even in the absence of proof to sustain the plaintiff's claim. *Case v. Hannahs*, 2-495.

(4209) **§ 398. Trial; Set-Off or Counter-Claim.** In any place where a set-off or counter-claim has been presented, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed his action or failed to appear.

An action to foreclose a mortgage may be dismissed without prejudice to a future action, before the case is called for trial, notwithstanding the defendant has filed an answer amounting to a counter-claim; but such defendant has the right of proceeding to the trial of his claim, regardless of the dismissal. *Amos v. Loan Association*, 21-474.

(4210) **§ 399. Foreclosure Suit; Personal Judgment.** In actions to enforce a mortgage, deed of trust, or other lien or charge, a personal judgment or judgments shall be rendered for the amount or amounts due, as well to the plaintiff as other parties to the action having liens upon the mortgaged premises by mortgage or otherwise, with interest thereon, and for the sale of the property charged and the application of the proceeds, or such application may be reserved for the further order of the court; and the court shall tax the costs, attorney's

fees, and expenses which may accrue in the action, apportion the same among the parties according to their respective interests, to be collected on the order of sale or sales issued thereon; when the same mortgage embraces separate tracts of land situated in two or more counties, the sheriff of each county shall make sale of the lands situated in the county of which he is sheriff. No real estate shall be sold for the payment of any money, or the performance of any contract or agreement in writing, in security for which it may have been pledged or assigned, except in pursuance of a judgment of a court of competent jurisdiction ordering such sale. [L. 1870, ch. 87, § 13 (§ 399, as amended); took effect May 12, 1870.]

Every deed of conveyance in this state, whether absolute or conditional, and whether made to a trustee or not, if made for the purpose of securing a debt, and for that purpose only, is a mortgage, and can be enforced only by an action in a court of competent jurisdiction. *McDonald v. Kellogg*, 30-171.

Mortgage of realty, and rents and profits, does not transfer title to rents and profits, and the lien on them can only be enforced as in other actions. *Seckler v. Delfs*, 25-159.

Suppose no personal judgment was permissible under the pleadings: would the decree of foreclosure and sale be thereby rendered a nullity? Is it the intention of § 399 of the code to prevent foreclosures without a personal judgment against some party? If the mortgagor be deceased, cannot the mortgage be foreclosed without the appointment of an administrator? *Walkenhorst v. Lewis*, 24-426.

Under our statutes, in suits upon notes secured by real estate mortgages, the mortgagees recover judgments for the amount of the debt, and that the premises shall be sold under a special *feri facias*. Such special execution is similar to an order to sell real estate seized upon attachment to secure a claim, and the order of sale of real estate to satisfy a mechanic's lien. Prior to the sale, the law gives the right to redeem in all these cases. After the sale, there is no redemption in either case. *Blandin v. Wade*, 20-255.

A personal judgment is always rendered in foreclosure cases in this state. No interest is recoverable in this case, owing to the usury laws in force at the time of contract. *Jenness v. Cutter*, 13-510.

The plaintiff must always sue for the debt, whether he asks to have the mortgaged property applied in payment thereof or not; and his judgment is always a personal judgment for the debt whether he obtains an order to have the property sold to satisfy the debt or not. *Lichty v. McMartin*, 11-568.

A proper reading of this statute would probably be: The court may tax such costs, and such only, as may legally accrue in the action; it may tax such attorney's fees, and such only, as may legally accrue in the action, etc.; but a judgment cannot be rendered for attorney's fees by virtue of this statute alone. *Stover v. Johnnycake*, 9-372.

In a suit to foreclose a mechanic's lien, an attachment may be had. *Gillespie v. Lovell*, 7-423.

Personal judgment may be rendered in mechanic's-lien cases. *Haight v. Schuck*, 6-192.

(4211) **§ 400. Judgment for Conveyance, etc.** When a judgment shall be rendered for a conveyance, release or acquittance, in any court of this state, and the party against whom the judgment shall be rendered does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available, as if the conveyance, release or acquittance had been executed conformably to such judgment; or the court may order such conveyance, release or acquittance to be executed in the first instance by the sheriff; and such conveyance, release or acquittance, so executed, shall have the same effect as if executed by the party against whom the judgment was rendered. This section shall apply to decrees rendered or to be rendered in suits now pending.

(*Code 1859, § 385.*) Applied to suits for reforming and foreclosing mortgages by publication. *Carey v. Reeves*, 32-722.

(4212) **§ 401. Account Taken.** If the taking of an account, or the proof of a fact, or the assessment of damages, be necessary to enable the court to pronounce judgment upon a failure to answer, or after a decision of an issue of law, the court may, with the assent of the party not in default, take the account, hear the proof, or assess the damages; or may, with the like assent, refer the same to a referee or master commissioner, or may direct the same to be ascertained or assessed by a jury. If a jury be ordered, it shall be on or after the day on which the action is set for trial.

JUDGMENT BY CONFESSION.

(4313) **§ 402. Judgment by Confession.** Any person indebted, or against whom a cause of action exists, may personally appear in a court of competent jurisdiction, and, with the assent of the creditor or person having such cause of action, confess judgment therefor; whereupon judgment shall be entered accordingly.

This section does not apply to confession of judgment before justice of peace, where that court has jurisdiction of the parties and the subject-matter. *Burkhalter v. Jones*, 32-5.

Confessions of judgment, provided for in § 402, must be made in open court, and cannot be taken by a clerk in vacation. *Miffin v. Stalker*, 4-284.

(4214) **§ 403. Confession of Judgment by Attorney.**

Judgments may be entered upon confession by an attorney, authorized for that purpose by a warrant of attorney, acknowledged or proved as conveyances of land, without any previous process or proceeding; and judgments so entered shall be a lien from the date of entry.

(4215) **§ 404. Judgment; Contents.** The debt or cause of action shall be briefly stated in the judgment, or in writing, to be filed as pleadings in other actions.

(4216) **§ 405. Affidavit of Defendant.** Before any judgment shall be entered by confession, an affidavit of the defendant must be filed, stating concisely the facts on which the indebtedness arose, and that the amount of such indebtedness is justly due and owing by the defendant to the plaintiff.

(4217) **§ 406. Execution.** Such judgment shall authorize the same proceedings for its enforcement as judgments rendered in actions regularly brought and prosecuted; and the confession shall operate as a release of errors.

(4218) **§ 407. Warrant of Attorney.** Every attorney, who shall confess judgment in any case, shall, at the time of making such confession, produce the warrant of attorney for making the same to the court before which he makes the confession, and the original, or a copy of the warrant, shall be filed with the clerk of the court in which the judgment shall be entered.

(4219) **§ 408. Judgment by Confession; Prisoner.** If any person be in custody in a civil action, at the suit of another, no warrant of attorney, executed by the person in custody, to confess judgment in favor of the person at whose suit he is in custody, shall be of any force, unless some attorney, expressly named by the person in custody, be present and sign the warrant of attorney as a witness.

MANNER OF GIVING AND ENTERING JUDGMENT.

(4220) **§ 409. Judgment Rendered on Verdict.** When a trial by jury has been had, judgment must be entered by the clerk in conformity to the verdict, unless it is special, or the court order the case to be reserved for future argument or consideration.

In practice, and under §§ 409 to 414 of our code, the clerk, by order or permission of the court, enters the judgment (as well as every other proceeding) in all cases in *full* upon the journal, and this judgment is valid, and has force and effect, as soon as it is entered on the journal, whether it is ever signed by the judge or not, and whether it is ever transcribed into the complete record or not. *French v. Pease*, 10-54.

After the judgment is fully recorded, it is valid, and has force and effect, notwithstanding the pendency of the motion for a new trial. When a stay is desired pending the hearing of this motion, an order of the court to that effect should be obtained. *Church v. Goodin*, 22-528.

(4221) **§ 410. Judgment on Special Verdict.** Where the verdict is special, or where there has been a special finding on particular questions of fact, or where the court has ordered the case to be reserved, it shall order what judgment shall be entered.

(4222) **§ 411. Contrary to Verdict.** Where, upon the statement in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party.

(4223) **§ 412. Judgment on Counter-Claim, Set-off, etc.** If a counter-claim or set-off, established at the trial, exceed the plaintiff's claim so established, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any affirmative relief, judgment shall be given therefor.

(4224) **§ 413. Judgment Against Infants.** It shall not be necessary to reserve, in a judgment or order, the right of an infant to show cause against it after his attaining full age; but in any case in which, but for this section, such reservation would have been proper, the infant, within one year after arriving at the age of twenty-one years, may show cause against such order or judgment.

A judgment rendered against a minor, without the appointment of a guardian *ad litem*, may be voidable but is not void. *Walkenhorst v. Lewis*, 24-427.

(4225) **§ 414. Journal Entry.** All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in [the] action.

A motion to require a pleading to be made more definite and certain is a part of the record, and need not be incorporated in a bill of exceptions. *L. L. & G. R. R. v. Commissioners*, 18-177.

(4226) **§ 415. Record.** The clerk shall make a complete record of every cause as soon as it [is] finally determined, whenever such record shall be ordered by the court.

The law of 1862 required a final record in every case, unless waived; and the law of 1868 provides for one when ordered by the court. *L. L. & G. R. R. v. Commissioners*, 18-177.

No "complete record" is required to be made, unless ordered by the court, and the court seldom orders the same to be done. *French v. Pease*, 10-54.

(4227) **§ 416. Signed.** He shall make up such record, in each cause, in the vacation next after the term at which the same was determined; and the presiding judge of such court shall, at its next term thereafter, subscribe the same.

(4228) **§ 417. Record.** The record shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court; but if the items of an account, or the copies of papers attached to the pleadings, be voluminous, the court may order the record to be made by abbreviating the same, or inserting a pertinent description thereof, or by omitting them entirely. Evidence must not be recorded.

The words, "all material acts and proceedings of the court," are broad enough to include motions to reform the pleadings. *L. L. & G. R. R. v. Commissioners*, 18-177.

The presumption in favor of the proceedings of a court of general jurisdiction will not arise when it appears that only a part of the record is offered. *Hargis v. Morse*, 7-418.

(4229) **§ 418. Completing Records.** When the judicial acts or other proceedings of any court have not been regularly brought up and recorded by the clerk thereof, such court shall cause the same to be made up and recorded within such time as it may direct. When they are made up, and, upon examination found to be correct, the presiding judge of such court shall subscribe the same.

(4230) **§ 419. Judgment a Lien.** Judgments of courts of record, of this state, and of courts of the United States rendered within this state, shall be liens on the real estate of the debtor, within the county in which the judgment is rendered, from the first day of the term at which the judgment is rendered; but judgments by confession, and judgments rendered at the same term during which the action was commenced, shall bind such lands only from the day on which such judgment was rendered. An attested copy of the journal entry of any judgment, together with a statement of the costs taxed against the debtor in the case, may be filed in the office of the clerk of the district court of any county, and such judgment shall be a lien on the real estate of the debtor, within that county, from the date of filing such copy. The clerk shall enter such judgment on the appearance and judgment dockets in the same manner as if rendered in the court of which he is clerk. Executions shall only be issued from the court in which the judgment is rendered.

An action may be maintained on a domestic judgment in this state, although it is in full force and effect, and the time within which an execution can issue has not expired. *Hummer v. Lamphear*, 32-441.

(*Code 1862, §§ 433, 434.*) Judgments of district courts were a lien for five years on lands, and as long thereafter as the judgments should be kept alive by the issue of executions in the proper time. *Hummer v. Lamphear*, 32-441.

A judgment binds personal property and real estate without the county from the time that it is seized in execution, but as to real estate within the county, the judgment operates as a lien from the first day of the term in which it is rendered. As to the latter lands, the levy neither makes nor strengthens the lien, and its particular necessity is not clear; however, as the statute provides for it, doubtless it must be made, but no great stress need be laid upon it as an essential fact in the preservation of defendant's rights. *Ritchie v. Higginbotham*, 26-649.

The judgment is a lien upon that which is his, and not that which simply appears to be his. *Holden v. Garrett*, 23-108.

Subsequent occupancy as a homestead will not defeat a judgment lien, if the property was not a homestead at the time of the judgment. *Ashton v. Ingle*, 20-671.

The judgment lien attaches merely to the interest of the judgment debtor in the land, and nothing more. *Harrison v. Andrews*, 18-542.

A judgment in this state is a lien on the lands of the defendant in the county in which the judgment is rendered, acquired subsequently to the judgment and before it has become dormant. *Babcock v. Jones*, 15-296.

A mortgage given by the holder of the legal title, transferred to an innocent purchaser for value before maturity, is superior to a judgment lien against the owner of the mere equitable interest in said lands. *Kirkwood v. Foster*, 11-476.

Mortgage misdescribing lands held superior to judgment lien. *Swarts v. Steer*, 2-236.

ARTICLE 18—CAUSES OF ACTION WHICH SURVIVE, AND ABATEMENT OF ACTIONS.

SEC.

420. What causes of action survive.

421. What actions shall not abate.

SEC.

422. Personal representatives may maintain action, in what case.

(4231) **§ 420. Actions that Survive.** In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same.

Section 420 was § 410 in code 1859. Section 420, as construed with § 422, only causes the actions to survive for injury to the person, when the death

does not result from such injury, but does occur from other circumstances. The right of action, under § 422, is exclusive; and an administrator could not maintain an action, under §§ 420 and 422, for the same injury. When death results from *wrongful acts*, § 422 is intended solely to apply. *McCarthy v. R. R.*, 18-52.

Cause of action for money had and received, whether obtained tortiously or otherwise, as well as every other cause of action which affects injuriously the estate of the party injured, will survive after the death of the party injured. *Stewart v. Balderston*, 10-142.

(4232) § 421. **Not Abate.** No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, for a nuisance, or against a justice of the peace for misconduct in office, which shall abate by the death of the defendant.

(4233) § 422. **Action for Death, Limitation, etc.** When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

Suit for killing of passenger; amended petition filed, alleging deceased was being transported as an employé of the company when killed, not error. *K. P. R. R. v. Salmon*, 14-512.

In this state the remedy, when death ensues from the wrong done, is by action in the name of the personal representative of the deceased, and the amount recovered will be for the benefit of the widow and children, if any, or next of kin. *Limekiller v. H. & St. J. R. R.*, 33-88.

In 16-568, the law of Colorado relating to administrators was not pleaded in the answer or referred to in the case; that decision was rendered upon the theory that the Colorado statute contained a provision similar to § 422 of our code. *Limekiller v. H. & St. J. R. R.*, 33-89.

Action brought under this section. *Brown v. A. T. & S. F. R. R.*, 31-9.

Action for injury to person, not resulting in death, is limited to two years; § 422, and subd. 3 of § 18, compared. *A. T. & S. F. R. R. v. King*, 31-710.

In an action under § 422, to recover damages for death of party, and outside of the question of exemplary damages, the recovery is to be of a pecuniary compensation for a pecuniary loss. The administratrix in this case was appointed in Colorado. *K. P. R. R. v. Cutter*, 19-83.

The money recovered by the administrator, in an action given by § 422, cannot be used for the costs and expenses of administration, or to satisfy

the debts of the creditors of the deceased; and an action based upon this statute is not an "estate" or "assets," within the act respecting executors and administrators. *Perry v. St. J. & W. R. R.*, 29-423.

If the deceased was not an inhabitant or resident of this state at the time of her death, and if she left no estate to be administered within this state, and none came into it afterward, then the probate court of Doniphan county had no jurisdiction to issue letters of administration on the estate of the deceased, or to appoint the plaintiff her administrator, and all its acts in doing so are void *in toto*. *Perry v. St. J. & W. R. R.*, 29-423.

If the probate courts of this state have no jurisdiction to grant letters of administration upon the estate of the decedent, and the probate court of any other state has that jurisdiction, the foreign administrator thus appointed can prosecute the action. (16-568.) *Perry v. St. J. & W. R. R.*, 29-424.

Section 422 does not confer a right of action for an injury inflicted in another state. *McCarthy v. Railroad*, 18-46.

An administrator appointed in another state or territory can maintain an action in this state, under § 422. *K. P. R. R. v. Cutter*, 16-569.

An action against a city, for damages resulting from the killing of a man by a mob, should be brought in the name of the personal relative of the deceased. *City of Atchison v. Twine*, 9-350.

ARTICLE 19—REVIVOR—REVIVOR OF ACTIONS.

SEC.

- 423. Where one of several plaintiffs, etc., dies, if cause of action survive, the action may proceed.
- 424. Trial may proceed, as against remaining parties, when one party dies, and cause of action does not survive.
- 425. Action may be revived, and proceed in name of representative, when.
- 426. Proceedings to revive.
- 427. The same.
- 428. The same.
- 429. The same.
- 430. In whose name revived, when plaintiff dies.
- 431. When defendant dies.
- 432. When defendant in real action dies.

SEC.

- 433. Must be revived against representatives of defendant in one year.
- 434. Order to revive may be made, with consent, after one year.
- 435. If action not revived, how disposed of.
- 436. The same.
- 437. Trial of revived action shall be had, when.

REVIVOR, AND NEW PARTIES TO JUDGMENT.

- 438. Joint debtors not originally summoned, may be made parties to judgment by action.
- 439. When one or both parties die after judgment.
- 440. Dormant judgment, how revived.

(4234) § 423. **Death of Party.** Where there are several plaintiffs or defendants in an action, and one of them dies, or his powers as personal representative cease, if the right of ac-

tion survive to or against the remaining parties the action may proceed, the death of the party or the cessation of his powers being stated on the record.

(4235) **§ 424. Death of Party; Trial Proceed.** Where one of several plaintiffs or defendants dies, or his powers as a personal representative cease, if the cause of action do not admit of survivorship, and the court is of opinion that the merits of the controversy can be properly determined and the principles applicable to the case fully settled, it may proceed to try the same as between the remaining parties; but the judgment shall not prejudice any who were not parties at the time of trial.

(4236) **§ 425. Revivor.** When one of the parties to an action dies, or his powers as a personal representative cease before the judgment, if the right of action survive in favor of or against his representatives or successors, the action may be revived and proceed in their names.

Where the plaintiff, in an action on a note and mortgage, assigns the same to a third person and afterward dies, it is error to allow such action to be prosecuted to a final judgment in the name of the administrator of said plaintiff. *Reynolds v. Quaely*, 18-364.

(4237) **§ 426. Proceedings for Revivor.** The revivor shall be by an order of the court, if made in term, or by a judge thereof, if in vacation, that the action be revived in the names of the representatives or successor of the party who died, or whose powers ceased, and proceed in favor of or against them.

(4238) **§ 427. Order of Revivor.** The order may be made on the motion of the adverse party, or of the representatives or successor of the party who died, or whose powers ceased, suggesting his death or the cessation of his powers, which, with the names and capacities of his representatives or successor, shall be stated in the order.

(4239) **§ 428. Notice for Revivor.** If the order is made by consent of the parties, the action shall forthwith stand revived; and, if not made by consent, notice of the application for such order shall be served in the same manner and returned within the same time as a summons, upon the party adverse to the one making the motion; and if sufficient cause be not shown against the revivor, the order shall be made.

As the order of the revivor of the judgment was made without notice, the court acted without jurisdiction, and such revivor was wholly void. Substantially, the revivor stands as made, without notice to or consent of the parties adverse thereto. As the order of revivor was void, the sale of the property in dispute upon the execution issued upon such order falls, and

neither H. nor his grantees acquired any right of title or possession to the premises by virtue of the sheriff's sale made upon the execution issued upon said void order of revivor, or by the sheriff's deed executed upon such sale. *Gruble v. Wood*, 27-537.

(4240) **§ 429. Revivor by Publication.** When the plaintiff shall make an affidavit that the representatives of the defendant, or any of them, in whose name it is desired to have the action revived, are non-residents of the state, or have left the same to avoid the service of the order [notice], or so concealed themselves that the order [notice] cannot be served upon them, or that the names and residence of the heirs or devisees of the person against whom the action may be ordered to be revived, or some of them, are unknown to the affiant, a notice may be published for three consecutive weeks, notifying them to appear on a day therein named, not less than ten days after the publication is complete, and show cause why the action should not be revived against them; and, if sufficient cause be not shown to the contrary, the order shall be made.

The refusal of a township in this state to elect or designate some officer upon whom service of summons can be made, does not authorize service by publication. *Brockway v. Oswego Township*, 32-223 (overruling 28-474.)

(4241) **§ 430 Revivor when Plaintiff Dies.** Upon the death of the plaintiff in an action, it may be revived in the names of his representatives, to whom his right has passed. Where his right has passed to his personal representatives, the revivor shall be in their names; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names.

Where the plaintiff, in an action on a note and mortgage, assigns the same to a third person, and afterward dies, it is error to allow such action to be prosecuted to final judgment in the name of the administrator of said plaintiff. *Reynolds v. Quaily*, 18-364.

(4242) **§ 431. Revivor on Death of Defendant.** Upon the death of a defendant in an action, wherein the right, or any part thereof, survives against his personal representatives, the revivor shall be against them; and it may, also, be against the heirs and devisees of the defendant, or both, when the right of action, or any part thereof, survives against them.

(4243) **§ 432. Revivor in Ejectment.** Upon the death of a defendant in an action for the recovery of real property only, or which concerns only his rights or claims to such property, the action may be revived against his heirs or devisees, or both, and an order therefor may be forthwith made, in the manner directed in the preceding sections of this article.

(4244) **§433. Limitation One Year.** An order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor, unless in one year from the time it could have been first made.

A judgment against a deceased cannot be revived against his widow and heirs, without their consent, unless the same is done within one year after the order of revivor could have been first made. *Myers v. Kothman*, 29-19.

Statutes of limitation do not run against any claim or demand during any portion of the time while a suit is pending for the enforcement of such claim or demand. *Kothman v. Skaggs*, 29-14.

An action before judgment cannot be revived without the consent of the defendant or proposed defendant, unless in one year from the time the order could have been made. The proceeding to revive an action, and the proceeding to revive a judgment, are substantially the same; each must correspond to the same formula. Hence, where an action cannot be revived without the consent of the administrator, neither can a judgment. We think that a judgment cannot be revived against an administrator after a year has elapsed within which it could be revived, except with the consent of the administrator, and that the rule is a reasonable one. *Angell v. Martin*, 24-335.

A judgment creditor holding a money judgment against a deceased person, cannot revive it against the administrator of such deceased person, against the will of such administrator, unless he does it within one year after the appointment and qualification of such administrator. *Scroggs v. Tutt*, 23-182.

(4245) **§434. After One Year.** An order to revive an action, in the names of the representatives or successor of a plaintiff, may be made forthwith, but shall not be made without the consent of the defendant, after the expiration of one year from the time the order might have been first made; but where the defendant shall also have died, or his powers have ceased, in the meantime, the order of revivor, on both sides, may be made in the period limited in the last section.

Judgment cannot be revived against administrator, unless by consent, except within one year after appointment of administrator. *Angell v. Martin*, 24-335.

(4246) **§435. Action to be Dismissed.** When it appears to the court, by affidavit, that either party to an action has been dead for a period so long that the action cannot be revived in the names of his representatives or successors without the consent of both parties, or when a party sues or is sued as a personal representative, that his powers have ceased, the court shall order the action to be dismissed at the costs of the plain-

tiff. [L. 1870, ch. 87, § 14 (§ 435, as amended); took effect May 12, 1870.]

(4247) **§ 436. Dismissal at Instance of Defendant.** At any term of the court succeeding the death of the plaintiff, while the action remains on the docket, the defendant having given the plaintiff's proper representatives, in whose name the action might be revived, ten days' notice of the application therefor, may have an order to strike the action from the docket, and for costs against the estate of the plaintiff, unless the action is forthwith revived.

(4248) **§ 437. Trial of Action.** When, by the provisions of the preceding sections, an action is revived, the trial thereof shall not be postponed by reason of the revivor, if the action would have stood for trial at the term the revivor is complete, had no death or cessation of powers taken place.

The revivor of the case in the name of the administrator of a deceased defendant, and permitting such administrator to file pleadings, does not necessarily compel a continuance. *Rice v. Hodge*, 26-168.

REVIVOR, AND NEW PARTIES TO JUDGMENT.

(4249) **§ 438. Judgment Against Joint Debtors.** When a judgment is recovered against one or more persons, jointly indebted upon contract, those who were not originally summoned may be made parties to the judgment, by action.

The novel and anomalous provisions of § 427 (§ 438), providing for making defendants not served before judgment parties thereto, held not applicable to a case when the effect would be to subject one not a party to the original suit to an erroneous and excessive judgment. *Robinson v. Kinney*, 2-184.

(4250) **§ 439. Death of Party After Judgment.** If either or both parties die after judgment, and before satisfaction thereof, their representatives, real or personal, or both, as the case may require, may be made parties to the same, in the same manner as is prescribed for reviving actions before judgment; and such judgment may be rendered, and execution awarded, as might or ought to be given or awarded against the representatives, real or personal, or both, of such deceased party.

Any demand against an estate is legally and properly exhibited against the estate by the commencement of an action against the administrator to enforce such demand. *Kothman v. Skaggs*, 29-16.

A judgment against a deceased person cannot be revived against his widow and heirs, without their consent, unless the same is done within one year after the order of revivor could have been first made. (23-182; 24-334.) *Myers v. Kothman*, 29-19.

"Such judgment" *may* "be rendered." *May*, means must or shall, when used in such connection. And where there is no condition imposed by the administrator, but simply a general consent given to a revivor, the revivor must be a simple revivor of the judgment, leaving its effect and the manner of its enforcement to be determined by the general rules regulating all similar judgments against like parties. *Halsey v. Van Vliet*, 27-478.

The mere filing with the probate court having the administration of an estate, of a certified transcript of a judgment rendered against the deceased in his lifetime, and the subsequent classification of the demand by said court, is not a valid exhibition and establishment of the claim against the estate. In the absence of notice named in §§ 84 and 91 of the administrator's act, and the affidavit required by § 88 of the same chapter, and without waiver on the part of the administratrix, or appearance by her, the probate court had not jurisdiction to allow or classify the judgment. *Scroggs v. Tutt*, 20-274.

(4251) **§ 440. Judgment Dormant.** If a judgment become dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment.

The refusal of a township in this state to elect or designate some person upon whom service of summons can be made, does not authorize service by publication or revivor by publication. *Brockway v. Oswego Twp.*, 32-223.

An action before judgment cannot be revived without the consent of the defendant or proposed defendant, unless in one year from the time the order could have been made. *Angell v. Martin*, 24-335.

ARTICLE 20—EXECUTIONS.

SEC.

441. Executions, how issued.

442. Kinds of executions.

EXECUTIONS AGAINST THE PROPERTY OF THE JUDGMENT DEBTOR.

443. Property subject to levy.

444. To be bound, from what time.

445. Judgment becomes dormant, when.

446. Execution against property; its command and indorsement.

447. Preference given to executions.

448. Goods and chattels to be first taken.

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(4252) **§ 441. Executions, How Issued.** Executions shall be deemed process of the court, and shall be issued by the clerk, and directed to the sheriff of the county. They may be directed to different counties at the same time.

(4253) **§ 442. Kinds of Executions.** Executions are of four kinds: *First*, Against the property of the judgment debtor. *Second*, Against his person. *Third*, For the delivery of the possession of real or personal property, with damages for withholding the same, and costs. *Fourth*, Executions in special cases.

EXECUTIONS AGAINST THE PROPERTY OF THE JUDGMENT DEBTOR.

(4254) **§ 443. Property Subject to Levy.** Lands, tenements, goods and chattels, not exempt by law, shall be subject to the payment of debts, and shall be liable to be taken on execution and sold, as hereinafter provided.

An action may be maintained on a domestic judgment in this state, although in full force, and time has not elapsed within which an execution can issue. *Hummer v. Lamphear*, 32-441.

We think that the personal property should be first levied upon and first sold, but we know of no good reason why real estate might not be levied upon between the levy upon the personal property and its sale, provided the personal property is insufficient to satisfy the execution. *Sullenger v. Buck*, 22-30.

A mortgage given by the holder of the legal title, transferred to an innocent purchaser for value before maturity, is superior to a judgment lien against the owner of the mere equitable interest in said lands. *Kirkwood v. Koester*, 11-476.

Mortgage of the homestead, executed by the husband alone, is void. And a judgment against a husband alone is no lien on the homestead. And such land may be sold by husband and wife jointly, notwithstanding such mortgage and judgment, and execution sale on the judgment of the homestead will be void. *Morris v. Ward*, 5-239.

(4255) **§ 444. Execution, Lien Under.** All real estate, not

bound by the lien of the judgment, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution.

A judgment binds personal property and real estate without the county from the time that it is seized in execution, but as to real estate within the county, the judgment operates as a lien from the day of its rendition, and in some cases from the first day of the term in which it is rendered. *Ritchie v. Higginbotham*, 26-649.

It might be argued that the words "of the debtor" only qualify the immediately preceding words, "goods and chattels," and not the prior clause, "all real estate," etc., but comparing the two sections together, it is plain that no larger or other interest is taken by the levy of an execution upon real estate outside the county than is covered by the lien of the judgment upon real estate within the county. (2-241.) *Holden v. Garrett*, 23-108.

Under § 433, code 1862, *held*, that the lands, tenements and hereditaments, and all rights thereto, and interest therein, equitable as well as legal, belonging to the debtor, and situate within the county where the judgment is entered, are bound for the satisfaction of the judgment from the first day of the term at which it is rendered. *Kiser v. Sawyer*, 4-503.

(*Code 1859, § 433.*) Section 13 of the act relating to conveyances, (Comp. Laws 1862, p. 355,) does not extend the benefits of a want of notice to judgment-lien holders. They are not "purchasers." Their lien is upon the "lands and tenements of the debtor," and not upon lands and tenements not in fact belonging to him. *Swarts v. Stees*, 2-241.

(4256) **§ 445. Judgment Dormant.** If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered, in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor.

Statutes of limitation do not run against any claim or demand during any portion of the time while a suit is pending for the enforcement of such claim or demand. *Kothman v. Skaggs*, 29-14.

The judgment might also, without any formal revivor, be used as a foundation of an action against the representatives or the successor of the deceased. (23-181; 26-558.) *Kothman v. Skaggs*, 29-17.

Whether there is any such thing as the revivor of a judgment of a justice of the peace, is not decided. *Angell v. Martin*, 24-335.

Sec. 44, which merely provides for judgments becoming dormant, cannot apply to judgments of this kind rendered in the probate court, for no executions, such as are contemplated by said § 445, can be issued from the probate court on such a judgment. *Fletcher v. Wormington*, 24-263.

Judgment lien lost by negligence of judgment debtor. *Tutt v. Ferguson*, 13-53.

A judgment becomes dormant after the lapse of five years without execution, and must be revived before execution or order of sale can issue. *State v. McArthur*, 5-281.

(4257) **§ 446. Execution; Contents.** The writ of execution against the property of the judgment debtor, issuing from any court of record in this state, shall command the officer to whom it is directed, that of the goods and chattels of the debtor he cause to be made the money specified in the writ; and for want of goods and chattels, he cause the same to be made of the lands and tenements of the debtor; and the amount of the debt, damages and costs, for which the judgment is entered, shall be indorsed on the execution.

(4258) **§ 447. No Priority.** When two or more writs of execution against the same debtor shall be sued out during the term in which judgment was rendered, or within ten days thereafter, and when two or more writs of execution against the same debtor shall be delivered to the officer on the same day, no preference shall be given to either of such writs; but if a sufficient sum of money be not made to satisfy all [such] executions, the amount made shall be distributed to the several creditors in proportion to the amount of their respective demands. In all other cases, the writ of execution first delivered to the officer shall be first satisfied. And it shall be the duty of the officer to indorse on every writ of execution the time when he received the same; but nothing herein contained shall be so construed as to affect any preferable lien which one or more of the judgments, on which execution issued, may have on the lands of the judgment debtor.

(4259) **§ 448. "No Goods;" Levy on Lands.** The officer to whom a writ of execution is delivered, shall proceed immediately to levy the same upon the goods and chattels of the debtor; but if no goods and chattels can be found, the officer shall indorse on the writ of execution "No goods," and forthwith levy the writ of execution upon the lands and tenements of the debtor, which may be liable, to satisfy the judgment.

Where the judgment is not a specific lien upon any particular property of the judgment debtor, he has an undoubted right to have his personal goods (subject to execution) exhausted first, before any of his real estate is taken to satisfy the judgment. (2-161.) And after all his personal goods have been exhausted, he still has the right to take the chances of the officer levying on some other real estate before levying on his homestead. *Greene v. Barnard*, 18-521.

Judgment lien lost by negligence of judgment debtor. *Tutt v. Ferguson*, 13-53.

A return upon an execution, that the officer is unable to find any goods and chattels of defendant's on which to levy, is sufficient to sustain a levy on real estate, even though he fails to indorse the exact expression "no goods." *Treptow v. Buse*, 10-170.

Sec. 448 does not provide, nor does any other section provide what shall be done where there are both personal and real property, and where the personal property is not sufficient to satisfy the execution. We think that the personal property should be first levied upon and first sold, but we know of no good reason why real estate might not be levied upon between the levy upon the personal property and the sale, provided the personal property is insufficient to satisfy the execution. *Sullenger v. Buck*, 22-30.

It is the duty of a sheriff to levy on the property of the judgment debtor as soon as he conveniently can after receiving the writ. *Armstrong v. Grant*, 7-294.

(*Code 1859, § 457.*) The object of the provision for such endorsement is, that the personal property of the debtor may be first applied in payment of the debt, and if there is none, to place proof of that fact upon the record to satisfy the court of the regularity of the sale in that respect, upon motion for confirmation. *Koehler v. Ball*, 2-173.

(4260) **§ 449. Property Claimed by Third Person.** If the officer, by virtue of an execution issued from any court of record in this state, shall levy the same on any goods and chattels claimed by any person other than the defendant, or be requested by the plaintiff to levy on any such goods and chattels, the officer may require the plaintiff to give him an undertaking, with good and sufficient securities, to pay all costs and damages that he may sustain by reason of the detention or sale of such property; and until such undertaking shall be given, the officer may refuse to proceed as against such property.

The sheriff is not bound to levy where the judgment debtor has no property subject to an execution, nor on goods and chattels where the title to the same is doubtful, unless the judgment creditor gives him an indemnity bond; nor generally on real estate, unless the same is pointed out to him by the judgment creditor. *Armstrong v. Grant*, 7-294.

(4261) **§ 450. Possession of Property; Bond for Delivery.** In all cases where a sheriff, coroner or other officer shall, by virtue of an execution, levy upon any goods and chattels which shall remain upon his hands unsold, for want of bidders, for the want of time to advertise and sell, or any other reasonable cause, the officer may, for his own security, take of the defendant an undertaking, with security, in such sum as he may deem sufficient, to the effect that the said property shall be delivered to the officer holding an execution for the sale of the same, at the time and place appointed by said officer, either by notice, given in writing, to said defendant in execution, or by adver-

tisement, published in a newspaper printed in the county, naming therein the day and place of sale. If the defendant shall fail to deliver the goods and chattels at the time and place mentioned in the notice to him given, or to pay to the officer holding the execution the full value of said goods and chattels, or the amount of said debt and costs, the undertaking, given as aforesaid, may be proceeded on as in other cases.

A mere sheriff's sale never vests a legal title: it takes a deed to vest a legal title upon a sheriff's sale. *Board v. Linscott*, 30-265.

(4262) **§ 451. Notice of Sale.** The officer who levies upon goods and chattels, by virtue of an execution issued by a court of record, before he proceeds to sell the same shall cause public notice to be given of the time and place of sale, for at least ten days before the day of sale. The notice shall be given by advertisement, published in some newspaper printed in the county, or, in case no newspaper be printed therein, by setting up advertisements in five public places in the county. Two advertisements shall be put up in the township where the sale is to be held; and where goods and chattels levied upon cannot be sold for want of bidders, the officer making such return shall annex to the execution a true and perfect inventory of such goods and chattels, and the plaintiff in such execution may thereupon sue out another writ of execution, directing the sale of the property levied upon as aforesaid; but such goods and chattels shall not be sold, unless the time and place of sale be advertised, as hereinbefore provided.

Section 451 refers solely to a levy upon goods and chattels. If for any reason they are not sold upon the execution under which they were levied upon, that section provides for the issue of a writ, which, while not called a *vendi*, is doubtless its equivalent. *Ritchie v. Higginbotham*, 26-647.

(4263) **§ 452. Further Levy.** When any writ shall issue, directing the sale of property previously taken in execution, the officer issuing said writ shall, at the request of the person entitled to the benefit thereof, his agent or attorney, add thereto a command to the officer to whom such writ shall be directed, that if the property remaining in his hands not sold shall, in his opinion, be insufficient to satisfy the judgment, he shall levy the same upon lands and tenements, goods and chattels, or either, as the law shall permit, being the property of the judgment debtor, sufficient to satisfy the debt.

Section 452 probably refers only to such writs as are named in the previous section; yet if it were held to extend to executions upon which levies upon real estate are made, it would simply show that where a *vendi* was ordered out for the sale of real estate, it would be perfectly proper to include

in it the ordinary command of a *feri facias* to make the debt. *Ritchie v. Higginbotham*, 26-647.

(4264) § **453. Appraisement.** If execution be levied upon lands and tenements, the officer levying such execution shall call an inquest of three disinterested householders, who shall be resident within the county where the lands taken in execution are situate, and administer to them an oath, impartially to appraise the property so levied on, upon actual view; and such householders shall forthwith return to said officer, under their hands, an estimate of the real value of said property.

A householder, under this section, need not be a man of family; it is sufficient if he is the owner of real property, and resides in the community, even though living with another family. *Kutter v. Buckout*, 4-120.

(4265) § **453a. Appraisement Waived.** That if the words "appraisement waived," or other words of similar import, shall be inserted in any deed, mortgage, bond, note, bill or written contract hereafter made, any court rendering judgment thereon shall order as part of the judgment that the same, and any process issued thereon, shall be enforced, and that lands and tenements may be sold thereunder without appraisement; and such judgment, and any process issued thereon, shall be enforced, and sales of lands and tenements made thereunder, without any appraisement or valuation being made of the property to be sold: *Provided*, That no order of sale or execution shall be issued upon such judgment until the expiration of six months from the time of the rendition of said judgment. [L. 1872, ch. 66, § 1; took effect March 14, 1872.]

Order of sale issued six days too soon. "We do hold in this case, where all proceedings were taken after the time fixed by the statute and judgment, that after the confirmation of the sale and the execution of the deed it was too late to attack the order of sale as being prematurely issued, and that it cannot now be attacked by the defendants in the judgment, or any person claiming under them." *Cross v. Knox*, 32-735.

The judgment directs issue of order of sale at the expiration of thirty days, and sale without appraisement. This is error. None may issue in such a case until after six months. (18-361; 21-124.) *Bashor v. Nordyke*, 25-226.

(4266) § **453b. Repeal.** All laws and parts of laws in conflict with any of the provisions of this act, are hereby repealed. [L. 1872, ch. 66, § 2; took effect March 14, 1872.]

(4267) § **454. Return of Appraisement; Sale.** The officer receiving such return shall forthwith deposit a copy thereof with the clerk of the court from which the writ issued, and adver-

tise and sell such property, agreeably to the provisions of this article.

Where a motion is made to set aside a sale of real estate, and an order of confirmation thereof, on the ground that there had been no advertisement of the property sold, such as is required by law, and it appears that the party in whose interest the sale has been made, and the purchaser at the sale, came before the court and waived all objections to the form of the proceedings, and consented to the hearing upon said motions, and it further appears that the allegations of the motion as to the want of a proper advertisement were true, as a matter of fact: *Held*, That under the circumstances the court should have granted the motion. A sale of lands made on a day not named in the notice of sheriff's sale, or where they are not properly described, should be set aside. *Wheatley v. Terry*, 6-427.

The whole of § 454 is probably merely directory. * * * The legislature have unmistakably shown that they did not consider said section of itself sufficient to authorize the court to set aside a sheriff's sale for want of the proper advertisement, and for that enacted § 457. *Moore v. Pye*, 10-252.

(4268) **§ 455. Judgment Lien Restricted.** If, upon such return, as aforesaid, it appear, by the inquisition, that two-thirds of the appraised value of said lands and tenements, so levied upon, is sufficient to satisfy the execution, with costs, the judgment on which such execution issued shall not operate as a lien on the residue of the debtor's estate, to the prejudice of any other judgment creditor; but no such property shall be sold for less than two-thirds of the value returned in the inquest; and nothing in this section contained shall, in any wise, extend to affect the sale of lands by the state, but all lands, the property of individuals indebted to the state for any debt or taxes, or in any other manner, shall be sold, without valuation, for the discharge of such debt or taxes, agreeably to the laws in such cases made and provided.

(4269) **§ 456. Judgment Against Officers; Sale.** If the property of any clerk, sheriff, coroner, justice of the peace, constable, or any collector of state, county, town or township tax, shall be levied on for, or on account of, any moneys that now are, or may hereafter be, by them collected or received in their official capacity, the property so levied on shall be sold without valuation.

(4270) **§ 457. Notice of Sale.** Lands and tenements taken on execution shall not be sold until the officer cause public notice of the time and place of sale to be given, for at least thirty days before the day of sale, by advertisement in some newspaper printed in the county, or, in case no newspaper be

printed in the county, in some newspaper in general circulation therein, and by putting up an advertisement upon the court house door, and in five other public places in the county, two of which shall be in the township where such lands and tenements lie. All sales made without such advertisement shall be set aside, on motion, by the court to which the execution is returnable.

A sheriff is not primarily liable to the publisher of a newspaper for the printer's fees for notices of sales of lands made by him upon executions or orders of sale, simply because he officially hands such notices to the publisher and requests them printed. *Baker v. Wade*, 25-531.

"For" at least thirty days. The preposition "for," as used, largely determines the interpretation given to the section. The difference in the language of §457 of the code, and §82, ch. 107, Gen. Stat. 1868, taken in connection with §81 of the same chapter, is obvious. By §81 the treasurer was required to make out the list of lands and town lots, delinquent for taxes, between the first and tenth days of March of each year, with the accompanying notice, and in §82 the language is, the list and notice are to be published "once in each week for four consecutive weeks prior to the day of sale." *Watkins v. Inge*, 24-617.

In sales of real estate upon execution or order of sale, the notice of sale published in the newspaper must be first published at least thirty days prior to the day of sale, and continued in each successive issue of the paper up to the day of sale. *Whitaker v. Beach*, 12-492.

In sales of real estate upon execution, notice by posting on the court-house door, and in five other public places, is necessary only when there is no newspaper printed in the county. Notice published in the newspaper must be continued in each successive issue thereof up to the day of sale, the first insertion being more than thirty days prior thereto. *McCurdy v. Baker*, 11-111.

A sale of lands made on a day not named in the notice of sheriff's sale, or where they are not properly described, should be set aside. *Wheatley v. Terry*, 6-427.

A sheriff's sale of two separate lots, made in gross, though not void, is irregular and voidable, and may be set aside on motion of the judgment debtor. *Johnson v. Hovey*, 9-61.

We do not think that the court below should have set aside the sale simply because the sheriff did not file the copy of the appraisal with the clerk until seven days after he commenced to advertise the notice of sale. *Moore v. Pye*, 10-252.

First publication July 13th, sale August 14th. Publication was in the weekly paper, and was repeated each consecutive week from the time of the first publication to the day of sale. This, we think, satisfies the statute. *Treptow v. Buse*, 10-177.

(4271) **§458. Confirmation; Sale.** If the court, upon the return of any writ of execution, for the satisfaction of which

any lands or tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has, in all respects, been made in conformity to the provisions of this article, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed for such lands and tenements; and the officer, on making such sale, may retain the purchase-money in his hands until the court shall have examined his proceedings, as aforesaid, when he shall pay the same to the person entitled thereto, agreeably to the order of the court.

Immediately upon the confirmation of the sale it is the duty of the sheriff to pay the purchase-money in his hands "to the person entitled thereto." *Ferguson v. Tutt*, 8-378.

The sheriff has nothing to do with the confirmation of the sale; it may be confirmed without his consent. *Ferguson v. Tutt*, 8-379.

(*Code 1859, § 449.*) The principle that if the record shows the final judgment to be erroneous, it is the right of the party aggrieved to have it reversed, vacated or modified, held to apply to final orders made in an action after judgment; and, *held*, that the order to confirm the sale in this case was reviewable by the supreme court, without exception taken in the court below. *Koehler v. Ball*, 2-172.

On a motion to confirm a sale, the court cannot go behind the execution nor receive any evidence except as to the regularity of the proceedings. *Challiss v. Wise*, 2-197.

District court setting aside sale without any sufficient reason therefor, the order will be reversed by supreme court on petition in error. *Moore v. Pye*, 10-246.

A sale in chancery is not complete till it is confirmed, but when confirmed it passes to the purchaser all the interest the defendant possessed and the decree ordered sold. *Mills v. Ralston*, 10-206.

Proceedings before a court having jurisdiction of the subject-matter, and of the person; a sheriff's deed executed on a sale made under such proceedings cannot be impeached collaterally. *Paine v. Spratley*, 5-525; *Bowman v. Cockrill*, 6-311.

Sale of lands made by the sheriff on a day not named in his notice of sale is illegal, and should be set aside. So, also, where lands are sold which are not described in such notice. *Wheatley v. Terry*, 6-427.

(*Code 1859, § 449.*) Where, under § 449, code 1859, a motion is made to confirm a sale, the court should confine itself to an examination of the return of the officer, and if that shall show *prima facie* that all the requirements of the statute have been complied with, the sale ought to be confirmed, and the motion cannot be resisted except on the face of the papers. *White Crow v. White Wing*, 3-276.

(4272) § 459. **Sheriff's Deed.** The sheriff or other officer

who, upon such writ or writs of execution, shall sell the said lands and tenements, or any part thereof, shall make to the purchaser as good and sufficient deed of conveyance of the lands and tenements sold, as the person or persons against whom such writ or writs of execution were issued could have made of the same, at or any time after they became liable to the judgment. The deed shall be sufficient evidence of the legality of such sale, and the proceedings therein, until the contrary be proved, and shall vest in the purchaser as good and as perfect an estate in the premises therein mentioned, as was vested in the party at, or after, the time when such lands and tenements became liable to the satisfaction of the judgment; and such deed of conveyance, to be made by the sheriff or other officer, shall recite the execution or executions, or the substance thereof, and the names of the parties, the amount and date of rendition of each judgment, by virtue whereof the said lands and tenements were sold as aforesaid, and shall be executed, acknowledged and recorded as is or may be provided by law, to perfect the conveyance of real estate in other cases.

The mere sheriff's sale never vests a legal title. It takes a deed to vest a legal title upon a sheriff's sale. *Board v. Linscott*, 30-265.

That the registry acts apply with all their force and vigor to sheriffs' deeds as well as to other deeds, we suppose will hardly be questioned. *Marshall v. Shepard*, 23-324.

The word "recite," as used in said statute, does not mean to copy or to repeat *verbatim*, but only to state the substance of the execution, etc. *Ogden v. Walters*, 12-290.

Where a service by publication is made in a foreclosure case without proper affidavit being filed, the deed is void. *Shields v. Miller*, 9-398.

(4273) **§ 460. Printer's Fees; Notice of Sale.** The officer who levies upon goods and chattels, or lands and tenements, or who is charged with the duty of selling the same, by virtue of any writ of execution, may refuse to publish a notice of the sale thereof, by advertisement in a newspaper, until the party for whose benefit such execution issued, his agent or attorney, shall advance to such officer so much money as will be sufficient to discharge the fees of the printer for publishing such notice.

A sheriff is not primarily liable to the publisher of a newspaper for the printer's fee for notices of sales of land made by him upon executions or orders of sale, simply because he officially hands such notices to the publisher and requests them to be printed. *Baker v. Wade*, 25-531.

(4274) **§ 461. Advertising Fees.** Before any officer shall be excused from giving the notification, mentioned in the last section, he shall demand of the party for whose benefit the

execution was issued, his agent or attorney (provided either of them reside in the county), the fees in said section specified.

(4275) **§ 462. Place of Sale; Officers Not Purchase.** All sales of lands or tenements under execution shall be held at the court house, in the county in which such lands and tenements are situated. No sheriff or other officer making the sale of property, either personal or real, nor any appraiser of such property, shall, either directly or indirectly, purchase the same; and every purchase, so made, shall be considered fraudulent and void.

The right of the sheriff to employ an auctioneer is denied. We shall not decide this, but concede that he may so delegate his trust, he being personally present. But with the delegation goes the statute. As he may not sell to himself, neither can the auctioneer who acts for him. *Galbraith v. Drought*, 24-592.

Neglect of sheriff to bid for plaintiff does not affect sheriff's sale. He cannot bid as sheriff, and if he bids he must bid as agent of another. *Moore v. Pye*, 10-246.

Sale at court-house door must of necessity be at the court house. *Smith v. Burnes*, 8-202.

(4276) **§ 463. Other Executions.** If lands or tenements, levied on as aforesaid, are not sold upon one execution, other executions may be issued to sell the property so levied upon.

The language of this section does not name the *fiery facias*, or *vendi*, as used under the old common-law practice, but speaks of executions, and from the form of the expression, evidently contemplates writs of the same nature. It says, when "not sold upon one execution, other executions may be issued." The natural inference from such language is, that writs of the same kind and form are referred to. *Ritchie v. Higginbotham*, 26-647.

(4277) **§ 464. Several Executions in Officer's Hands.** In all cases where two or more executions shall be put into the hands of any sheriff or other officer, and it shall be necessary to levy on real estate to satisfy the same, and either of the judgment creditors, in whose favor one or more of said executions are issued, shall require the sheriff or other officer to levy said executions, or so many thereof as may be required, on separate parcels of the real property of the judgment debtor or debtors, giving to the officer making the levy on behalf of the creditor, whose execution may, by the provisions of this article, be entitled to a preference, the choice of such part of the real property of the judgment debtor or debtors, as will be sufficient, at two-thirds of the appraised value, to satisfy the same; and in all cases where two or more executions, which are entitled to no preference over each other, are put into the

hands of the same officer, it shall be the duty of the officer, when required, to levy the same on separate parcels of the real property of the judgment debtor or debtors, when, in the opinion of the appraisers, the same may be divided without material injury; and if the real property of said debtors will not be sufficient, at two-thirds of its appraised value, to satisfy all the executions chargeable thereon, such part of the same shall be levied on, to satisfy each execution, as will bear the same proportion in value to the whole, as the amount due to the execution bears to the amount of all the executions chargeable thereon, as near as may be, according to the appraised value of each separate parcel of real property.

(4278) **§ 465. Successor.** If the term of service of the sheriff or other officer who has made, or shall hereafter make sale of any lands and tenements, shall expire, or if the sheriff or other officer shall be absent, or be rendered unable, by death or otherwise, to make a deed of conveyance of the same, any succeeding sheriff or other officer, on receiving a certificate from the court from which the execution issued for the sale of said lands and tenements, signed by the clerk, by order of said court, setting forth that sufficient proof has been made to the court that such sale was fairly and legally made; and on tender of the purchase-money, or if the same or any part thereof be paid, then, on proof of such payment and tender of the balance, if any, may execute to the said purchaser or purchasers, or his or their legal representatives, a deed of conveyance of said lands and tenements so sold. Such deed shall be as good and valid in law, and have the same effect, as if the sheriff or other officer who made the sale had executed the same.

It was competent for the sheriff to sell said property by his under-sheriff, (who is merely a general deputy,) and afterward, when the sale was confirmed by the court, to execute the deed himself. *Ogden v. Walters*, 12-290.

(4279) **§ 466. Overplus After Sale.** If, on any sale made as aforesaid, there shall be in the hands of the sheriff or other officer, more money than is sufficient to satisfy the writ or writs of execution, with interest and costs, the sheriff or other officer shall, on demand, pay the balance to the defendant in execution, or his legal representatives.

Where lands are sold under a judgment, and surplus money accrues, which is brought into court, the other creditors have the same liens upon the surplus money which they held upon the lands before the sale. *Butler v. Craig*, 29-207.

A failure of the officer to pay the balance to the defendant in the execution, after paying the judgment, is ground of amercement. *Jenkins v. Green*, 22-567.

(4280) **§ 467. Reversal of Judgment; Title to Land.** If any judgment or judgments, in satisfaction of which any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers; but, in such cases, restitution shall be made, by the judgment creditors, of the money, for which such lands or tenements were sold, with lawful interest from the day of sale.

Modification of the original judgment cannot have the force or effect to destroy the title to the property already vested in purchaser. *Pritchard v. Madren*, 31-47.

We regard §§ 77 and 467 of the code as only declarations of the previous common-law rule; and, like that rule, they were adopted to protect third persons purchasing under the authority of a judgment or decree. They apply to strangers to the judgment, who have purchased under the honest belief that the judgment is valid. If the judgment is afterward reversed, or opened up, the defendant who has lost his property must look to the plaintiff for redress. *Howard v. Entreken*, 24-430.

This section has application solely to *bona fide* purchasers, who are not parties to the erroneous judgment, nor responsible therefor, and who do not have reason to believe that such erroneous judgment will be reversed or vacated by the appellate court. *Hubbard v. Ogden*, 22-673.

A sale of mortgaged property under a decree of foreclosure, erroneously barring the right of redemption as to a part thereof, is valid; and a modification of the decree, so as to make it correct, will not affect the sale, nor the title of the purchaser. *Smith v. Burnes*, 8-203.

(4281) **§ 468. Lien Lost; New Appraisement.** No judgment heretofore rendered, or which hereafter may be rendered, on which execution shall not have been taken out and levied before the expiration of one year next after its rendition, shall operate as a lien on the estate of any debtor, to the prejudice of any other judgment creditor. But in all cases where judgment has been or may be rendered in the supreme court, and a special mandate awarded to the district court to carry the same into execution, the lien of the judgment creditor shall continue for one year after the first day of the term of the district court to which such mandate may be directed. Nothing in this section contained shall be construed to defeat the lien of any judgment creditor who shall fail to take out execution and cause a levy to be made, as herein provided, when such failure shall be occasioned by appeal, proceedings in error, injunction, or by vacancy in the office of sheriff or coroner, or the disability of such officer, until one year after such disability shall be removed. In all cases where real estate has been or may hereafter be taken on execution and appraised, and twice

advertised and offered for sale, and shall remain unsold for want of bidders, it shall be the duty of the court from which such execution issued, on motion of the plaintiff, to set aside such appraisal and order a new one to be made, or to set aside such levy and appraisal and award a new execution to issue, as the case may require.

As to § 468 of the civil code, we think it has no room for operation in this action, for an execution was issued and levied upon the property in controversy within less than one year after the rendition of the judgment, which wholly prevented said § 468 from so operating as to destroy, or even to impair, in any manner or degree, any of the force or efficacy of his judgment, or his judgment lien. *Kothman v. Skaggs*, 29-14.

When a judgment creditor allows more than one year to elapse after his judgment has become a lien on real estate, before he takes out and levies an execution, his lien becomes subsequent and inferior to the liens of other judgment creditors. *Lamme v. Schilling*, 25-96.

If a judgment creditor, while the judgment debtor is living, fails for one year to have an execution issued and levied, he loses his priority of lien as against all other judgment creditors of the same judgment debtor. A judgment cannot be revived against an administrator after a year has elapsed within which it could be revived, except with the consent of the administrator. *Scroggs v. Tutt*, 23-190.

(4282) **§ 469. Execution Returnable.** The sheriff or other officer, to whom any writ of execution shall be directed, shall return such writ to the court to which the same is returnable, within sixty days from the date thereof.

A sheriff cannot legally sell real estate on execution after the return day of the execution, and more than sixty days after its date and after it was issued. *Schultz v. Smith*, 17-306.

He could not be compelled to return the execution before the end of sixty days, and could not be held liable for any neglect or refusal to return the same before that time. *Armstrong v. Grant*, 7-292.

(4283) **§ 470. Judgment Against Principal and Surety.** In all cases where judgment is rendered in any court of record within this state, upon any instrument of writing in which two or more persons are jointly and severally bound, and it shall be made to appear to the court, by parol or other testimony, that one or more of said persons so bound, signed the same as surety or bail, for his or their co-defendant, it shall be the duty of the clerk of said court, in recording the judgment thereon, to certify which of the defendants is principal debtor, and which are sureties or bail. And the clerk of the court aforesaid shall issue execution on such judgment, commanding the sheriff or other officer to cause the money to be made of the

goods and chattels, lands and tenements, of the principal debtor; but for want of sufficient property of the principal debtor to make the same, that he cause the same to be made of the goods and chattels, lands and tenements, of the surety or bail. In all cases, the property, both personal and real, of the principal debtor, within the jurisdiction of the court, shall be exhausted before any of the property of the surety or bail shall be taken in execution.

Upon the question between the defendants in the court below, as to suretyship, no pleadings or other formalities were required by the code to bring the question before the court. Only the production of testimony was needed to make the fact appear. If then it was made to appear to the trial court, by parol or other evidence, that W. F. and H. M. T. signed the note declared on as principals, and Otis as surety, it became the duty of the clerk in certifying the judgment to certify that accordingly. (1-75.) *Turner v. Miller*, 28-49.

With §§ 55, 60 and 470 of the code taken together, the rights of a surety in cases like the present are pretty well protected; for where a surety is sued outside of his own county, he must, under §§ 55 and 60, be sued in connection with his principal, or with some co-surety. If sued with his principal, he may, under § 470, have his principal's property first exhausted in satisfying the debt, before his can be seized. *Brenner v. Egly*, 23-128.

But it is claimed that if Mrs. M. signed the note as surety, the judgment should have been rendered against her, under § 470. This question, however, was not raised in the court below, so far as appears from the record, and therefore it is not properly before this court for consideration. *Massey v. Building Association*, 22-635.

Section 470 only applies where the principal debtor is one of the defendants, and does not take away the right given elsewhere to sue the surety alone. (18-356.) *Swerdsfeger v. State*, 21-477.

This section applies to justice's court, in a suit on a promissory note. *Points v. Jacobia*, 12-53.

The same judgment may be rendered against one of the defendants as principal, and against another as surety. *Rose v. Williams*, 5-490.

(*Code 1859*, § 461.) In an action on a note against two or more, who apparently signed the note as makers, in which no answer is filed, it is not error for the court in its judgment to charge one as principal and the others as sureties. *Kupfer v. Sponhorst*, 1-75; *Rose v. Madden*, 1-445.

(4284) **§ 471. Fees of Appraisers; Penalty.** Each householder, summoned to appraise real estate under the provisions of this chapter, shall be allowed and receive for his services the sum of fifty cents for each day he may be so engaged as such appraiser, to be collected on the execution by virtue of which the property appraised was levied on, if claimed at the time of making the return of such appraisement. And when any

householder, summoned as aforesaid, shall fail to appear at the time or place appointed by the officer, and discharge his duty as appraiser, he shall, on complaint being made to any justice of the peace of the township in which such householder resides, forfeit and pay the sum of fifty cents for every such neglect, unless he can render a reasonable excuse. Such sum shall be collected by said justice, and paid in to the township treasurer, for the use of the township.

(4285) **§ 472. Failure to Sell; Liability of Officer.** If any sheriff or other officer shall refuse or neglect to execute any writ of execution to him directed, which has come to his hands, or shall neglect or refuse to sell any goods and chattels, lands and tenements; or shall neglect to call an inquest and return a copy thereof, forthwith, to the clerk's office; or shall neglect to return any writ of execution to the proper court, on or before the return day thereof; or shall neglect to return a just and perfect inventory of all and singular the goods and chattels by him taken in execution, unless the said sheriff or other officer shall return that he has levied and made the amount of the debt, damages and costs; or shall refuse or neglect, on demand, to pay over to the plaintiff, his agent or attorney of record, all moneys by him collected or received for the use of said party, at any time after collecting or receiving the same, except as provided in section four hundred and fifty-eight; or shall neglect or refuse, on demand made by the defendant, his agent or attorney of record, to pay over all moneys by him received for any sale made, beyond what is sufficient to satisfy the writ or writs of execution, with interest and legal costs, such sheriff or other officer shall, on motion in court, and two days' notice thereof, in writing, be amerced in the amount of said debt, damages and costs, with ten per cent. thereon, to and for the use of said plaintiff or defendant, as the case may be.

A sheriff is not primarily liable to the publisher of a newspaper for the printer's fee for notices of sales of lands made by him upon executions or orders of sale, simply because he officially hands such notices to the publisher, and requests them to be printed. *Baker v. Wade*, 25-532.

An order of amercement becomes a lien on the real estate of the officer amerced, situate within the county at the date of the order. *Knox v. Morrill*, 22-577.

A sheriff who receives an execution about thirty days before his term of office expires, but does not serve or return it or deliver it to his successor, cannot be amerced, unless it is shown he was negligent in failing or refusing to commence to execute the writ before his term expired. *Armstrong v. Grant*, 7-292.

A failure of the officer to pay the balance to the defendant in the execu-

tion, after paying the judgment, is ground of amercement. *Jenkins v. Green*, 22-567.

This section is imperative; it is not *may* be amerced but *shall* be amerced. *Bond v. Weber*, 17-411.

(4286) **§ 473. Liability of Clerk.** If any clerk of a court shall neglect or refuse, on demand made by the person entitled thereto, his agent or attorney of record, to pay over all money by him received in his official capacity, for the use of such persons, every such clerk may be amerced, and the proceedings against him and his sureties shall be the same as provided for, in the foregoing section, against sheriffs and their sureties.

(4287) **§ 474. Withholding Money.** When the cause of amercement is for refusing to pay over money collected as aforesaid, the said sheriff or other officer shall not be amerced in a greater sum than the amount so withheld, with ten per cent. thereon.

(4288) **§ 475. Execution to Sheriff of Another County.** When an execution is issued to the sheriff of any county other than that in which the judgment was rendered, the sheriff, after indorsing the date of its reception thereon, shall deliver the same to the clerk of the district court of his county, who shall thereupon enter the same in the execution docket in the same manner as if it had issued from the court of which he is clerk; and before the sheriff shall return any such writ, he shall cause his return to be entered in like manner.

A sheriff who receives an execution about thirty days before his term of office expires, but does not serve or return it or deliver it to his successor, cannot be amerced unless it is shown he was negligent in failing or refusing to commence to execute the writ before his term expired. *Armstrong v. Grant*, 7-292.

(4289) **§ 476. Liability of Officer; Return.** When execution shall be issued in any county in this state, and directed to the sheriff or coroner of another county, it shall be lawful for such sheriff or coroner having the execution, after having discharged all the duties required of him by law, to inclose such execution, by mail, to the clerk of the court who issued the same. On proof being made by such sheriff or coroner, that the execution was mailed soon enough to have reached the office where it was issued within the time prescribed by law, the sheriff or coroner shall not be liable for any amercement or penalty if it do not reach the office in due time.

(4290) **§ 477. Demand; Return of Money; Amercement.** No sheriff shall forward, by mail, any money made on any such execution, unless he shall be specially instructed

to do it by the plaintiff, his agent or attorney of record. In all cases of a motion to amerce a sheriff, or other officer of any county other than that from which the execution issued, notice in writing shall be given to such officer, as hereinbefore required, by leaving it with him, or at his office, at least fifteen days before the day on which such motion shall be made. All amercements so procured shall be entered on the record of the court, and shall have the same force and effect as a judgment.

(4291) **§478. Sureties of Sheriff Made Parties.** Each and every surety of any sheriff or other officer may be made party to the judgment rendered as aforesaid, against the sheriff or other officer, by action, to be commenced and prosecuted as in other cases; but the goods and chattels, lands and tenements of any such surety shall not be liable to be taken on execution, when sufficient goods and chattels, lands and tenements of the sheriff or other officer, against whom execution may be issued, can be found to satisfy the same. Nothing herein contained shall prevent either party from proceeding against such sheriff or other officer, by attachment, at his election.

It at most only means that when a judgment shall be rendered against the sheriff, his sureties may be made parties thereto, but that no property of the sureties shall be taken on execution until the property of the sheriff himself subject to execution shall be first exhausted. It does not prevent the rendering of a judgment against the sureties, as well as against the sheriff. *Fay v. Edmiston*, 28-108.

Although the sureties of a sheriff may be made parties to a judgment of amercement, under § 478 of the code, by action to be commenced and prosecuted as in other cases, the order or judgment of amercement is not conclusive as to the sureties, who may, in such a proceeding, prove everything which would have protected the officer from liability. *Graves v. Bulkley*, 25-249.

(4292) **§479. Officer Paying Claim.** In cases where a sheriff or other officer may be amerced, and shall not have collected the amount of the original judgment, he shall be permitted to sue out an execution and collect the amount of said judgment, in the name of the original plaintiff, for his use.

(4293) **§480. Contribution; Joint Debtors; Sureties.** When property, liable to an execution against several persons, is sold thereon, and more than a due proportion of the judgment is laid upon the property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several, and is upon an obligation of one of them, as

security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal; in such case, the person so paying or contributing is entitled to the benefit of the judgment, to enforce contribution or repayment, if within ten days after his payment he file, with the clerk of the court where the judgment was rendered, notice of his payment and claim to contribution or repayment. Upon a filing of such notice, the clerk shall make an entry thereof in the margin of the docket.

Said § 480 of the civil code was not enacted for the purpose of giving assignees of judgments a remedy as assignees. They have a remedy independent of such section, and could enforce their judgment if such section had never been enacted. Said section was really enacted for the benefit of sureties, and for the benefit of joint judgment debtors, without reference to whether any assignment had been made or not, and was enacted for their benefit in cases where the judgment, or more than a proper share thereof, has been collected from some one or more of the sureties or joint judgment debtors; and this whether the collection was by a sale of the property of some one or more of such parties on execution, or was by a voluntary payment on the part of some one or more of such parties. *Harris v. Frank*, 29-204.

Not passed on. *Points v. Jacobia*, 12-56.

PROCEEDINGS IN AID OF EXECUTION.

(4294) § 481. **Enforcing Judgment; Equitable Interests, etc.** When a judgment debtor has not personal or real property, subject to levy on execution, sufficient to satisfy the judgment, any equitable interest which he may have in real estate, as mortgagor, mortgagee, or otherwise, or any interest he may have in any banking, turnpike, bridge or other joint stock company, or any interest he may have in any money, contracts, claims, or choses in action, due or to become due to him, or in any judgment of decree, or any money, goods or effects which he may have in the possession of any person, body politic or corporate, shall be subject to the payment of such judgment, by action, or as hereinafter prescribed.

The provisions of the civil code, entitled "proceedings in aid of execution," are constitutional and valid, so far as the question is concerned of conferring power on the probate judge to act thereunder. *Young v. Ledrick*, 14-92.

Suit to set aside a fraudulent conveyance. The kind of action which we are now considering, is a kind of action of long standing, and is well recognized by all courts of equity, and there is nothing anywhere in the statutes that attempts in terms to abolish it; and while the statutes providing for

proceedings in aid of execution do not attempt to annul or destroy any other kind of action or proceeding, they would really seem to recognize some other kind of action or proceeding to accomplish the same purpose. Section 481 of the civil code, which is the first section for proceedings in aid of execution, provides, that the property therein mentioned "shall be subject to the payment of such judgment by *action*, or as hereinafter specified." *Ludes v. Hood*, 29-55.

We do not think the power of the court, under § 481 and following of the code, is defeated by the failure of defendant to appear in response to the order. The question of his interest may be determined, although he fails to appear to the order served upon him. *Jenkins v. Green*, 24-495.

Where a person sells his homestead, and does not at the time have any intention of using the proceeds thereof in purchasing another homestead, and has no intention of purchasing another homestead immediately, with any funds, such proceeds are not exempt from the payment of his debts. *Smith v. Gore*, 23-491.

P., holding a lien, prior in fact, but whose priority was not apparent on the record, could maintain an action to restrain an attempted sale upon execution of the property as the absolute property of the judgment debtor, unincumbered by any lien. (4-503). *Plumb v. Bay*, 18-418.

The showing of the equitable interest need not necessarily be by examination of the judgment debtor, but by any competent proof, by affidavit or otherwise, satisfactory to the court. The proceeding need not necessarily be before a judge; the court, "the greater," includes the judge, "the less." All the parties interested in the realty may be *brought* before the court. *Kiser v. Sawyer*, 4-503.

(4295) **§ 482. Debtor to Answer as to Assets.** When an execution against a judgment debtor, or one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or, if he do not reside in the state, to the sheriff of the county where the judgment was rendered, or a transcript of a justice's judgment has been filed, is returned unsatisfied, in whole or in part, the judgment creditor is entitled to an order of the probate judge, or judge of the district court, of the county to which the execution was issued, requiring such debtor to appear and answer concerning his property, before such judge, or a referee appointed by such judge, at a time and place specified in such order, within the county to which the execution was issued.

Judgment debtor cannot be required to appear and answer (concerning his property) outside of the county to which the execution against him was issued, but he may voluntarily waive his right to object. *State v. Burrows*, 33-15.

This law granting such powers to the probate judge is constitutional. *Young v. Ledrick*, 14-99.

(4296) **§ 483. Disclosure of Assets Required.** After the issuing of an execution against property, and upon the affidavit of the judgment creditor, his agent or attorney, that the judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, the probate judge or judge of the district court of the county in which the order may be served, may, by order, require the judgment debtor to appear, at a time and place in said county, to answer concerning the same; and such proceedings may thereupon be had, for the application of the property of the judgment debtor toward the satisfaction of the judgment, as hereinafter prescribed.

Where a judgment creditor of an incorporated company obtains from the district court rendering the judgment in the case an execution against the property of a stockholder of such corporation, upon notice and motion, under § 32, ch. 23, Gen. Stat. 198: *Held*, That such stockholder, against whom the execution is issued, is not a judgment debtor as contemplated by § 483, ch. 80, Gen. Stat. 724, so as to subject him to the proceedings in aid of executions authorized by that section. *Hentig v. James*, 22-326.

Attorney may make affidavit in proceedings in aid of execution. *Baker v. Knickerbocker*, 25-290.

(*Comp. Laws*, § 476.) An order of the district judge, made in proceedings in aid of execution, requiring a garnishee of the execution debtor to pay the money in his hands as such garnishee into the hands of the clerk of the district court, is a proper order under code, § 487 to § 504, but it is error to award an execution against the garnishee. *Arthur v. Hale*, 6-165.

(4297) **§ 484. Arrest of Debtor.** Instead of the order requiring the attendance of the judgment debtor, as provided in the last two sections, the judge may, upon proof to his satisfaction, by affidavit of the party or otherwise, that there is danger of the debtor leaving the state, or concealing himself, to avoid the examination herein mentioned, issue a warrant requiring the sheriff to arrest him and bring him before such judge, within the county in which the debtor may be arrested. Such a warrant can be issued only by a probate judge, or the judge of the district court, of the county in which such debtor resides or may be arrested. Upon being brought before the judge, he shall be examined on oath, and other witnesses may be examined on either side; and if, on such examination, it appear that there is danger of the debtor leaving the state, and that he has property which he unjustly refuses to apply to such judgment, he may be ordered to enter into an undertaking, in such sum as the judge may prescribe, with one or more sureties, that he will, from time to time, attend for examination before the judge or referee, as shall be directed. In default of

entering into such undertaking, he may be committed to the jail of the county, by warrant of the judge, as for a contempt.

(4298) **§ 485. Defendant Must Answer Questions.** No person shall, on examination pursuant to this article, be excused from answering any question on the ground that his examination will tend to convict him of a fraud; but his answer shall not be used as evidence against him in a prosecution for such fraud.

Held to be constitutional. *In re Burrows*, 33-680.

(4299) **§ 486. Debtor of Defendant May Pay Execution.** After the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt shall be a sufficient discharge for the amount so paid, or directed to be credited by the judgment creditor on the execution.

(*Code 1859, § 475.*) Therefore, there was no specific money in the hands of the defendants of which S. was the owner, and on which a levy could be made. (1 Cranch. 45.) This being so, the court under the pleadings did right in not allowing the sheriff's return to be read. The proof subsequently offered is open to the same objection. The defendants did not bring themselves within the provisions of § 475 of the code, even if the amendment allowing such proof had been permitted. *Scott v. Smith*, 2-445.

(4300) **§ 487. Garnishment; Party Indebted.** After the issuing or return of an execution against property of a judgment debtor, or of any one of several debtors in the same judgment, where it is made to appear by affidavit or otherwise, to the satisfaction of the judge, that there is reason to believe that any person or corporation has property of such judgment debtor, or is indebted to him, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place within the county in which such person or corporation may be served with the order to answer, and answer the same. The judge may, also, in his discretion, require notice of such proceeding to be given to any party in the action, in such manner as may seem to him proper.

(4301) **§ 488. Trial of Lien.** Witnesses may be required, upon the order of the judge, to appear and testify upon any proceedings under this article, in the same manner as upon the trial of an issue.

(4302) **§ 489. Examination.** The party or witness may be required to attend before the judge, or before a referee ap-

pointed by the court or judge. All examinations and answers before a judge or referee, under this article, must be on oath, and reduced to writing; but when a corporation answers, the answer must be on oath of an officer thereof.

(4303) **§ 490. Garnishment; Lien; Wages; Exemption.** The judge may order any property of the judgment debtor, not exempt by law, in the hands either of himself or any other person or corporation, or due to the judgment debtor, to be applied toward the satisfaction of the judgment, and may enforce the same by proceedings for contempt, in case of refusal or disobedience; but the earnings of the debtor for his personal services, at any time within three months next preceding the order, cannot be so applied, when it is made to appear, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor.

A showing by the judgment debtor, that his disobedience of the order was not willful or contumacious, but was occasioned by a lack of money or property with which to satisfy the judgment, would ordinarily entitle him to a discharge. *State v. Burrows*, 33-17.

An order of judge *pro tem.* of the district court, in a proceeding in aid of execution, under § 490, that a garnishee shall pay over to the judgment creditor certain money which he owes to the judgment debtor, is not a final determination of his liability. *Board v. Scoville*, 13-32.

Garnishee may not be imprisoned for failing to pay. *Board v. Scoville*, 13-32.

Section 157 of the justice's code really corresponds with § 490 of the civil code, and is intended more directly to relate to garnishment proceedings after judgment and in aid of execution; but, as we have said before, we think it may be extended so as to relate to all garnishment proceedings. *Seymour v. Cooper*, 26-546.

We think there can be no question as to the validity of said § 157 of the justice's code, and § 490 of the civil code, with the construction we have placed upon them. *Seymour v. Cooper*, 26-548.

An order made in proceedings in aid of execution, requiring a garnishee of the execution debtor to pay the money in his hands as such garnishee into the hands of the clerk of the district court, is a proper order. But it is error to direct an execution to issue against the garnishee to collect the money in case of default. *Maduska v. Thomas*, 6-161.

(4304) **§ 491. Transfer of Property Enjoined; Receiver.** The judge may also, by order, appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the judgment debtor, in the same manner and with like authority as if the appointment was made by the court. The judge may also, by order, forbid a transfer or other disposition

of the property of the judgment debtor, not exempt by law, and any interference therewith.

The statute provides the manner of reaching and selling a mortgagor's interest in real property. *Plumb v. Bay*, 18-48.

Where the property is levied on and sold subject to a mortgage, the purchaser takes it subject to the mortgage. The levy determines the sale, and nothing passes by the sale which is not taken under the levy. Provision is made for the sale of the mortgagor's interest where only that interest is sought to be appraised and sold. *Jenkins v. Green*, 22-567.

(4305) **§ 492. Receiver's Sale of Property in Aid of Execution.** If it shall appear that the judgment debtor has any equitable interest in real estate in the county in which proceedings are had, as mortgagor or mortgagee, or otherwise, and the interest of said debtor can be ascertained as between himself and the person or persons holding the legal estate, or the person or persons having a lien on or interest in the same, without controversy as to the interest of such person or persons holding such legal estate or interest therein, or lien on the same, the receiver may be ordered to sell and convey such real estate, or the debtor's interest therein. Such sale shall be conducted, in all respects, in the same manner as is provided by this code for the sale of real estate upon execution; and the proceedings of sale shall, before the execution of the deed, be approved by the court in which the judgment was rendered, or the transcript has been filed as aforesaid, as in case of sale upon execution.

(*Code 1862, § 481.*) How the fact of the debtor's having such interest shall be made to appear, which fact is preliminary to the proceeding in the section contemplated, as provided in § 472, code 1862 (§ 483), viz., upon proof by affidavit of the judgment creditor, or otherwise, to the satisfaction of the court. *Kiser v. Sawyer*, 4-511.

(4306) **§ 493. Sheriff as Receiver; Bond.** If the sheriff shall be appointed receiver, he and his sureties shall be liable on his official bond for the faithful discharge of his duties as receiver, and no additional oath shall be required of him; if any other person shall be appointed receiver, he shall give a written undertaking, in such sum as shall be prescribed by the judge, with one or more sureties, to the effect that he will faithfully discharge the duties of receiver, and he shall also take an oath to the same effect before acting as such receiver. The undertaking mentioned in this section shall be to the state of Kansas, and actions may be prosecuted for a breach thereof, by any person interested, in the same manner as upon a sheriff's official bond.

(4307) **§ 494. Vested with Property.** The receiver shall be vested with the property and effects and rights in action of the judgment debtor, not exempt by law, or such part thereof as the court or judge may order, and may sue for, collect, and recover, and dispose of the same, and apply the proceeds according to the order of the court or judge, and generally may do such acts concerning the property as the court or judge may authorize.

(4308) **§ 495. Possession of Property; Delivery to.** The court or judge may order the delivery, to the receiver, by the judgment debtor, or any other person in whose possession the same may be, [of] any notes, bills, accounts, contracts, books or other evidences of indebtedness or right in action, of the judgment debtor, and may enforce such order by attachment, as for a contempt.

(4309) **§ 496. Continuance.** The judge or referee, acting under the provisions of this article, shall have power to continue his proceedings, from time to time, until they shall be completed.

(4310) **§ 497. Reference.** The judge may, in his discretion, order a reference to a referee, agreed upon or appointed by him, to report the evidence or the facts.

(4311) **§ 498. Contempt.** If any person, party or witness disobey an order of the judge or referee, duly served, such person, party or witness may be punished by the judge, as for a contempt.

Garnishee may not be imprisoned for failing to pay money ordered. Board Education v. Scoville, 13-34.

(4312) **§ 499. Enter Orders.** The order mentioned in sections four hundred and eighty-two, four hundred and eighty-three, four hundred and ninety-one, and four hundred and eighty-seven, shall be in writing, and signed by the judge making the same, and shall be served as a summons in other cases. The judge shall reduce all his orders to writing, which, together with the minute of his proceedings, signed by himself, shall be filed with the clerk of the court of the county in which the judgment is rendered, or the transcript of the justice filed, and the clerk shall enter on his execution docket the time of filing the same.

(4313) **§ 500. Officers' Fees.** The judge shall allow to clerks, sheriffs, referees, receivers and witnesses such compensation as is allowed for like services in other cases, to be taxed as costs in the case, and shall enforce, by order, the collection thereof, from such party or parties as ought to pay the same.

(4314) **§ 501. Clerk's Fees.** The clerk shall be allowed such fees, for services under this head, as are allowed for similar services in other cases.

(4315) **§ 502. Execution Returned Unsatisfied; Garnishment.** When an execution shall have been returned unsatisfied, the judgment creditor may file an affidavit of himself, his agent or attorney, in the office of the clerk, setting forth that he has good reasons to, and does, believe that any person or corporation, to be named, has property of the judgment debtor, or is indebted to him; and thereupon the clerk shall issue an order, requiring such person or corporation to answer, on or before a day to be named in the order, not less than ten nor more than twenty days from the date of issuing the same, all interrogatories that may be propounded by the judgment creditor, concerning such indebtedness or property.

(4316) **§ 503. Interrogatories; Garnishment.** The judgment creditor, or his attorney, shall prepare interrogatories concerning such indebtedness or property, a copy of which shall be served on the garnishee at the time of the service of the order, or within three days thereafter. And the garnishee shall, on or before the day required in the order, file with the clerk full and true answers to all such interrogatories, verified by his affidavit.

The plaintiff cannot introduce any other evidence under this, and §§ 215 and 218, than the answer of the garnishee, except by the consent of parties. *Case v. Ingersoll*, 7-371.

(4317) **§ 504. Garnishment Proceedings.** All subsequent proceeding against the garnishee shall be the same as in cases of attachment, as far as applicable.

EXECUTIONS AGAINST THE PERSON.

(4318) **§ 505. Execution Against Person.** An execution against the person of the judgment debtor shall require the officer to arrest such debtor, and commit him to the jail of the county, until he pay the judgment, or is discharged according to law.

(4319) **§ 506. Execution Issued When.** An execution against the person of the debtor may be issued upon any judgment for the payment of money: *First*, When the judgment debtor has removed, or begun to remove, any of his property out of the jurisdiction of the court, with intent to prevent the collection of money due on the judgment. *Second*, When he has property, rights in action, evidences of debt, or some interest or stock in some corporation or company, which

he fraudulently conceals with the like intent. *Third*, When he has assigned or disposed of all, or any part, of his property, or rights in action, or has converted the same into money, with intent to defraud his creditors, or with the intent to prevent such property from being taken in execution. *Fourth*, When he fraudulently contracted the debt, or incurred the obligation, upon which the judgment was rendered. *Fifth*, When he was arrested, on an order, before judgment, and has not been discharged as an insolvent debtor, or the order has not been set aside, as improperly made.

(4320) **§ 507. Execution Against Person; How Allowed.** An execution against the person of the debtor, except as prescribed in section five hundred and nine, can be issued only when the same is allowed by the supreme court, the district court, or any judge of either, upon being satisfied, by the affidavit of the judgment creditor, or his attorney, and such other evidence as may be presented, of the existence of one or more of the particulars mentioned in section five hundred and six.

Attorney may make affidavit for executions against the person. *Baker v. Knickerbocker*, 25-290.

(4321) **§ 508. Execution by Justice.** A justice of the peace may issue an execution against the person of a judgment debtor, upon being satisfied of the existence of one or more of the same particulars, by the like affidavit and evidence.

(4322) **§ 509. Execution Against Person, Issue of.** In all cases in which the judgment debtor was arrested before judgment, and has not been released from imprisonment by an application for relief, as an insolvent debtor, and where the order for such arrest has not been adjudged improper, an execution against the person of such judgment debtor may issue of course.

(4323) **§ 510. Discharge from Execution.** Any person taken in execution as aforesaid, shall be discharged by delivering or setting off to the officer serving the same, if issued from a court of record, real or personal property, if issued from a justice of the peace, personal property only, sufficient to satisfy the judgment, and costs, for which the writ is issued.

(4324) **§ 511. Bond; Prison Bounds; Execution.** Any person imprisoned under the provisions of this article shall be entitled to prison bounds, which shall be co-extensive with the county, upon executing an undertaking, with one or more sufficient sureties, to be approved by the sheriff, to the effect that if the debtor go beyond the prison bounds before being

discharged according to law, he will pay to the plaintiff the amount of the execution, with interest and costs; but in case the person shall be out of jail, in prison bounds, the judgment creditor, upon whose judgment he was imprisoned, shall be entitled to execution against the lands and tenements, goods and chattels of the debtor, and all other remedies prescribed by this code for the collection of debts.

It is not a fatal defect in an undertaking given under § 511 of the code, that it fails to show that the debtor was actually in jail, provided it shows that he had actually been arrested under the writ of execution, and was then in the custody of the officer. The word "imprisoned," as used in said section, is broad enough to include any actual arrest and detention by the sheriff, whether in or out of jail. *Doyle v. Boyle*, 19-173.

Order permitting absence from state for thirty days cannot be attacked collaterally. *Randolph v. Simon*, 29-411.

(4325) **§ 512. Death of Execution Debtor.** The death of a person under arrest in an action does not satisfy the judgment; but an execution may issue thereon as if no arrest had been made.

(4326) **§ 513. Debtor Discharged.** If a person, imprisoned under an order of arrest made before judgment, is not charged in execution, within ten days after judgment, he shall be discharged from such imprisonment.

(4327) **§ 514. Discharge in General.** In cases of commitment under this article, or upon arrest before or after judgment, in civil cases, the person imprisoned, in case of his inability to perform the act or endure the imprisonment, may be discharged from imprisonment by the court or judge committing him, or the court or judge thereof in which the judgment was or might be rendered, on such terms as may be just.

Under this section, application was made, after notice to the plaintiffs in the judgment, for leave for the imprisoned debtor to go to Illinois, on account of the illness of his wife. Upon the hearing of his application, the leave was given to him to be absent for the term of thirty days. Before the expiration of the thirty days he returned, and has since remained within the county. * * * The order made after such hearing cannot be adjudged void. Whether the court erred in its ruling upon the facts, whether the order was or was not erroneously made, can only be determined by proceedings in error. *Randolph v. Simon*, 29-411.

EXECUTIONS FOR THE DELIVERY OF REAL AND PERSONAL PROPERTY.

(4328) **§ 515. Shall Require What.** If the execution be for the delivery of the possession of real or personal property,

it shall require the officer to deliver the same, particularly describing the property, to the party entitled thereto, and may, at the same time, require the officer to satisfy any costs or damages, recovered in the same judgment, out of the goods and chattels of the party against whom it was rendered; and, for the want of such goods and chattels, then out of the lands and tenements; and in this respect it shall be deemed an execution against the property.

(4329) **§ 516. Enforcing Judgments.** When the judgment is not for the recovery of money or real property, the same may be enforced by attachment, by the court rendering judgment, upon motion made, or by a rule of the court upon the defendant; but in either case, notice of the motion or a service of a copy of the rule shall be made on the defendant, a reasonable time before the order of attachment is made.

EXECUTIONS IN SPECIAL CASES.

(4330) **§ 517. Conform to Judgment.** In special cases, not hereinbefore provided for, the execution shall conform to the judgment or order of the court. When a judgment for any specified amount, and also for the sale of specific real or personal property, shall have been rendered, and an amount, sufficient to satisfy the amount of the debt or damages and costs, be not made from the sale of the property specified, an execution may issue for the balance, as in other cases.

DOCKETING JUDGMENTS OF JUSTICES OF THE PEACE, AND EXECUTIONS THEREON.

(4381) **§ 518. Docketing Abstract.** In all cases in which a judgment shall be rendered by a justice of the peace, the party in whose favor the judgment shall be rendered may file a transcript of such judgment in the office of the clerk of the district court of the county in which the judgment was rendered; and thereupon the clerk shall, on the day on which the same shall be filed, enter the case on the appearance docket, together with the amount of the judgment and time of filing the transcript; and shall also enter the same on the judgment docket, as in case of a judgment rendered in the court of which he is clerk.

It was held, in *Treptow v. Buse*, 10-170, that the filing of an abstract in the district court has the same force as the filing of the transcript of a judgment. The filing of an abstract of a judgment rendered before a justice of the peace obviously contemplates a transfer of the judgment from the justice's court; and after the judgment is so transferred to the district court, it

becomes subject to the same rules and vested with the same powers as though originally rendered in that court. *Rahm v. Soper*, 28-530.

It is apparent that the object of filing such an abstract is to give the judgment creditor a lien upon the real estate of the judgment debtor, and to permit him to issue execution out of the district court; but as the filing of the transcript or abstract of a dormant judgment does not give any lien upon any real estate, or authorize the issuance of any execution until further or additional steps are taken, § 518 does not apply where the judgment is dormant. *Lindgren v. Gates*, 26-137.

We think the abstract must have the same force as a transcript. *Trep-tow v. Buse*, 10-176.

(4382) **§ 519. Judgment Lien.** Such judgment shall be a lien upon the real estate of the judgment debtor, from the day of filing the transcript, in the same manner and to the same extent as if the judgment had been rendered in the district court.

Where a judgment creditor allows more than one year to elapse after his judgment has become a lien on real estate, before he takes out and levies an execution, his lien becomes subsequent and inferior to the liens of other judgment creditors. *Howell v. Pugh*, 25-96.

(4383) **§ 520. Execution.** Execution may be issued thereon, to the sheriff, by the clerk of the court, in the same manner as if the judgment had been taken in court; and the sheriff shall execute and return the same, as other executions; and in case of sale of real estate, his proceedings shall be examined and approved by the court as in other cases.

(4384) **§ 521. Amount Paid; Transcript.** The justice of the peace shall certify on the transcript the amount, if any, paid on such judgment.

The sureties of justice on his bond are liable for money collected by justice on a judgment rendered by him and which he refuses to pay over. *Brockett v. Martin*, 11-380.

(4385) **§ 522. Dormant Judgment; Revivor; Lien.** If such judgment becomes dormant, or if any of the parties thereto die before the same is satisfied, it may be revived in the same manner as other judgments in the district court; and a certified copy of the entry of such transcript may be filed in the office of the clerk of the district court of any other county, and shall be a lien on the real estate of the debtor in such county, from the date of the filing of such copy.

If a dormant judgment cannot be revived before a justice of the peace, certainly a revivor cannot be obtained by taking an abstract of such a judgment, and having proceedings thereon under § 522 of the code. If the judgment may be revived by the justice, such revivor ought to have been

had prior to filing a transcript in the district court. (24-334.) *Lindgren v. Gates*, 26-137.

As, in our view, the justice, after the filing of the abstract of the judgment in the district court, had not jurisdiction to issue process in the case, all of the garnishment proceedings after the transfer of the judgment to the district court must be regarded as nullities. *Rahm v. Soper*, 28-521.

ARTICLE 21—MISCELLANEOUS PROCEEDINGS—OFFER TO COMPROMISE.

SEC.

523. Effect of offer to compromise by defendant before trial.

524. The offer no cause of continuance.

SUBMITTING A CONTROVERSY.

525. Parties may submit case to court without action.

526. The record.

527. Judgment and reversal.

OFFER TO CONFESS JUDGMENT.

528. Effect of, if made by defendant after action brought.

PROCEEDINGS BY SURETIES.

529. To compel principal to pay debt.

SEC.

530. To obtain indemnity.

531. Remedies in such actions.

MOTIONS AND ORDERS.

532. Motion, what is.

533. May include several objects.

534. Notice of motion shall state what.

535. How served.

536. The same.

537. Motions without notice.

538. Order, what is.

539. To be entered in journal.

(4386) § 523. **Offer of Compromise; Costs.** The defendant, in an action for the recovery of money only, may, at any time before the trial, serve upon the plaintiff or his attorney an offer, in writing, to allow judgment to be taken against him for the sum specified therein. If the plaintiff accept the offer and give notice thereof to the defendant or his attorney, within five days after the offer was served, the offer, and an affidavit that the notice of acceptance was delivered within the time limited, may be filed by the plaintiff, or the defendant may file the acceptance, with a copy of the offer, verified by affidavit; and in either case, the offer and acceptance shall be noted in the journal, and judgment shall be rendered accordingly. If the notice of acceptance be not given in the period limited, the offer shall be deemed withdrawn, and shall not be given in evidence or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer.

(4387) § 524. **Continuance.** The making of an offer, pursuant to the provisions contained in the foregoing section, shall

not be a cause for a continuance of an action or a postponement of the trial.

SUBMITTING A CONTROVERSY.

(4338) **§ 525. May Submit Case.** Parties to a question, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court, which would have jurisdiction if an action had been brought. But it must appear, by affidavit, that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The court shall thereupon hear and determine the case, and render judgment as if an action were pending.

Case submitted under this section, upon an agreed statement of facts upon which the controversy depended; opinion *per curiam*. Stationery Co. v. Jones, 30-335.

This proceeding, under § 525, is a very satisfactory way of presenting a case to any court. By it all controversy as to matters of fact is eliminated, and a pure and simple question of law presented for decision. Turner v. Commissioners, 27-640.

The case agreed upon contains all the facts upon which the controversy depends. The parties have stated the facts in a very fair and candid manner, and submitted the question promptly and with an evident disposition to have the controversy so determined as to cause the least embarrassment to the people of that district. Smith v. Holt, 24-772.

Where F. claims to be the successor of M. as justice of the peace, and entitled to his docket, and M. disputes such claim, a question arises "which might be the subject of a civil action," and may be submitted upon an agreed case, under § 525. Frazer v. Miller, 12-459.

(4389) **§ 526. Record of Submitted Case.** The case, the submission, and a copy of the judgment, shall constitute the record.

(4340) **§ 527. Judgment and Reversal.** The judgment shall be with costs, may be enforced, and shall be subject to reversal, in the same manner as if it had been rendered in an action, unless otherwise provided in the submission.

Quoted, but not construed. Smith v. Holt, 24-772.

OFFER TO CONFESS JUDGMENT.

(4341) **§ 528. Offer to Confess Judgment.** After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action; whereupon, if the plaintiff, being present, refuse to accept such

confession of judgment in full of his demands against the defendant in the action, or, having had such notice that the offer would be made, of its amount, and of the time of making it, as the court shall deem reasonable, fail to attend, and on the trial do not recover more than was so offered to be confessed, such plaintiff shall pay all the costs of the defendant incurred after the offer. The offer shall not be deemed to be an admission of the cause of action, or the amount to which the plaintiff is entitled, nor be given in evidence upon the trial.

PROCEEDINGS BY SURETIES.

(4342) **§ 529. Action against Principal by Surety; Debt.** A surety may maintain an action against his principal, to compel him to discharge the debt or liability for which the surety is bound, after the same has become due.

(4343) **§ 530. Indemnity; Surety.** A surety may maintain an action against his principal, to obtain indemnity against the debt or liability for which he is bound, before it is due, whenever any of the grounds exist, upon which, by the provisions of this code, an order may be made for arrest and bail, or for an attachment.

(4344) **§ 531. Surety; Remedies.** In such action the surety may maintain any of the provisional remedies mentioned in articles nine, eleven and twelve, upon the grounds and in the manner therein described. [L. 1877, ch. 138, § 1 (§ 581, as amended); took effect March 7, 1877.]

MOTIONS AND ORDERS.

(4345) **§ 532. Motion Defined.** A motion is an application for an order, addressed to the court, or a judge in vacation, by any party to a suit or proceeding, or one interested therein, or affected thereby.

Under 3 Kas. 276, and 18 Kas. 535, it follows as a logical sequence, that when land has been attached, any person claiming to be the owner thereof, being interested therein and affected by such proceeding, may, although he is not a party to the original action, move the court to set aside the attachment as to his property. *Long v. Murphy*, 27-381.

Whatever fact a court may inquire into on a motion, it can also determine, and its determination establishes the fact for all purposes of the motion. *Hottenstein v. Conrad*, 9-436.

Motion to exclude the whole evidence as incompetent may be overruled, if any part of the evidence is competent. *Smith v. Brown*, 8-609.

Before a party can complain of the non-action of a court on a motion, he must show, by the record, that the action was asked and refused, and the refusal excepted to. *Bliss v. Burnes*, McC-91.

Amending record in publication service. The defect in the proof of publication could have been cured by amendment, so as to conform to the facts; but while the power to amend exists, and justice requires that amendments shall be made, if the facts originally existed to justify correction, such amendment cannot be made after the action has been disposed of and the term ended, without special or additional notice. *Hammerslough v. Hackett*, 30-65.

Any person interested in a suit may make a motion with reference to his interest, whether he is legally and technically a party thereto or not. (3-276; 18-537; 11-118; 9-674.) *Green v. McMurtry*, 20-193.

Where land has been sold on execution, any person claiming to be the owner thereof, and interested in defeating the sale, may, although he may not be a party to the suit, move the court to set aside such sale. (3-276.) *Harrison v. Andrews*, 18-538.

(Code 1859, § 515.) The contesting party to a sale under § 315, code 1859, the person interested in the real estate, whether a party to the suit or not, may make a motion to set aside a sale at any time before confirmation, and orally, and pending the motion to confirm, and in considering that motion the court is not confined to the return of the officer, but extraneous facts may be shown to invalidate the sale. *White Crow v. White Wing*, 3-276.

(4846) **§ 533. Several Objects in one Motion.** Several objects may be included in the same motion, if they all grow out of, or are connected with, the action or proceeding in which it is made.

(4847) **§ 534. Notice of Motion.** Where notice of a motion is required, it must be in writing, and shall state the names of the parties to the action or proceeding in which it is made, the name of the court or judge before whom it is to be made, the place where and the day on which it will be heard, the nature and terms of the order or orders to be applied for; and if affidavits are to be used on the hearing, the notice shall state that fact, and it shall be served a reasonable time before the hearing.

Amending the record to show legal publication, cannot be made after the action has been disposed of and the term ended, without special or additional notice. *Hammerslough v. Hackett*, 30-65.

The terms of a notice for the application of an order of revivor, to be served before the order shall be made, are clearly set forth in the statute, and although such notice is to be served in the same manner and returned within the same time as an ordinary summons, yet to give the court jurisdiction, the notice must be in substantial compliance with the statute. As the summons issued in no way complied with the statute, it cannot be said that the notice was merely defective. A summons was issued, but no notice. *Gruble v. Wood*, 27-537.

Now when notice of a motion is required, the statute provides that if af-

fidavits are to be used, the notice shall state that fact. But even then it is not required that the affidavits be filed, but simply that notice be given that they are to be used. *Werner v. Edmiston*, 24-150.

It is a general rule, though one with perhaps some exceptions, that notices required in legal proceedings must be in writing. This seems essential to the certainty and precision of such proceedings. (17-102.) The notice should have been a formal notice in writing, and served upon the plaintiffs or upon their attorneys (for occupying-claimant act). *Bauder v. Bryan*, 20-369.

(4348) **§ 535. Notice; How Served.** Notices of motions, mentioned in this article, may be served by a sheriff, coroner or constable, the party or his attorney, or by any other person, and the return of any such officer, or affidavit of any such person, shall be proof of service; the service shall be on the party, or his attorney of record, and in case there is more than one party adverse to such motion, service shall be made upon each party or his attorney.

(4349) **§ 536. Served by Officer.** The service of a notice shall be made as is required by law for the service of a summons; and when served by an officer, he shall be entitled to like fees.

Notice to fix liability of stockholder of insolvent corporation must be served like a summons, and such notice cannot go or be served beyond the jurisdiction of the state. *Howell v. Manglesdorf*, 33-198.

Service of notice for attorney's lien must be in writing, and may be served upon the party personally or his attorney of record, and service on a person in charge of a railroad depot does not bind the corporation. *K. P. Rly. v. Thacher*, 17-102.

(4350) **§ 537. Motions Without Notice.** Motions to strike pleadings and papers from the files may be made with or without notice, as the court or judge may direct.

(4351) **§ 538. Order Defined.** Every direction of a court or judge made, or entered in writing, and not included in a judgment, is an order.

Amendments cannot be made after the action has been disposed of, and the term ended, without special or additional notice. *Hammerslough v. Hackett*, 30-65.

(4352) **§ 539. Orders to be Entered.** Orders, made out of court, shall be forthwith entered by the clerk in the journal of the court, in the same manner as orders made in term.

ARTICLE 22—ERROR IN CIVIL CASES.

SEC.

540. What judgment or order may be reversed or modified by district court.
541. Judgment of probate court may be reversed.
542. Supreme court may reverse what judgments and orders.
543. What is a final order.
544. Proceedings to obtain reversal or modification.
545. The same.
546. The same.
- 546a. Original case-made may be attached to petition in error; costs.
547. Party desiring reversal may make case.
548. Case to be served on opposite party.
549. Time may be extended.
550. By whom and when transcript to be furnished.
551. When proceedings in error shall stay execution on judgment; plaintiff's undertaking.
552. Substitute for such undertaking.
553. Undertaking necessary in proceedings for reversal in vacation.
554. Undertaking to be approved.
555. Execution may be had on judgment by giving security to make restitution, etc.
556. Limitation.
557. Stay of execution on judgment of justice; undertaking by plaintiff in error.
558. Execution of judgment, how stayed.
559. Proceedings upon reversal; mandate to court below.
560. Opinion of supreme court to be filed; shall be part of the record.
561. Syllabus to be filed, and copy sent to court below.

SEC.

562. Costs in error.
563. Neglect of clerk not ground of error, until, etc.
564. Writs of error and *certiorari* abolished.
565. Costs when judgment of justice affirmed.
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567. Proceedings to review order discharging or modifying attachment or injunction.

PROCEEDINGS TO REVERSE, VACATE OR MODIFY JUDGMENTS AND ORDERS IN THE COURTS IN WHICH THEY ARE RENDERED.

568. District court may vacate or modify its own judgment after term. how.
569. Proceedings to correct mistakes, etc.; motion to vacate.
570. Proceedings to vacate or modify.
571. The same.
572. The same; effect on liens.
573. Order suspending proceedings; undertaking.
574. Suspension of judgment.
575. Time of commencing proceedings to vacate or modify judgment.
576. Provisions of this article to apply to what courts.
577. Who need not give undertaking on appeal, or proceedings in error.
578. Judgment for five per cent. upon amount due from plaintiff shall be rendered, when.
579. Summons in error not to be issued, when.
580. Cases pending when code takes effect, to be conducted to final judgment; liens to be preserved.

(4358) § 540. Vacating Judgment by District Court. A judgment rendered, or final order made, by a justice of the peace, or any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court.

The refusal of a probate judge to grant a druggist's permit, under the in-

toxicating-liquor law, is not appealable or reviewable. *Martin v. Probate Judge*, 32-147.

A county board of canvassers, when organized merely to canvass the returns of an election, is merely a board of ministerial officers; but when it is organized for the trial of a contested election for a township officer, it then becomes a judicial tribunal, or board exercising judicial functions, and a petition in error will then lie from its decisions to the district court. *Buckland v. Goit*, 23-327.

A justice modifies a judgment in replevin, in favor of defendant, and on petition in error by him; the district court affirms this judgment so modified; the plaintiff in error cannot complain. *Starr v. Hinshaw*, 23-532.

The supreme court has no authority to reverse, vacate or modify any judgment or order made by the probate court, or made by the judge of the probate court, while acting in the capacity of judge of the probate court. *Poplin v. Mundell*, 27-162.

Any error apparent in the final judgment of a district court may be corrected by suit in error in this court, although no exception was taken by the party complaining, and no motion made to set aside the judgment. *Commissioners v. Muhlenbacker*, 18-180.

(*Code 1859, § 523.*) A court for the trial of contested county elections, organized under § 13, ch. 89, C. L. 1862, held to be a tribunal exercising not ministerial, but judicial functions, and one that comes within the provisions of § 523 of the code, and held that the determinations of the tribunal may be revised by the district court of the county. *State v. Sheldon*, 2-322.

(4354) **§ 541. Judgment of Probate Court.** A judgment rendered, or final order made, by the probate court, may be reversed, vacated or modified by the district court, for errors appearing on record.

(*Code 1859, § 525.*) This section gives the jurisdiction of hearing appeals from final orders of probate courts to the district court of the county. *Crane v. Giles*, 3-54.

(4355) **§ 542. Supreme Court Reversing or Modifying Judgments and Orders.** The supreme court may reverse, vacate or modify a judgment of the district court, for errors appearing on the record; and in the reversal of such judgment or order, may reverse, vacate or modify any intermediate order involving the merits of the action, or any portion thereof. The supreme court may also reverse, vacate or modify any of the following orders of the district court, or a judge thereof: *First*, A final order. *Second*, An order that grants or refuses a continuance; discharges, vacates or modifies a provisional remedy; or grants, refuses, vacates or modifies an injunction; that grants or refuses a new trial; or that confirms, or refuses to confirm, the report of a referee; or that sustains or overrules a demurrer. *Third*, An order that involves the merits of an action, or some part thereof.

It must be remembered that an erroneous ruling, or an erroneous order, made by the district court upon a motion to require the adverse party to make his pleading more definite and certain, is not, under the statutes, a sufficient ground of itself upon which to found a petition in error in the supreme court. *Ludes v. Hood*, 29-52.

We suppose that an order refusing a new trial is a final order within the meaning of said § 556 of the civil code, and therefore, that a proceeding in error in the supreme court to reverse such an order must be commenced within one year after the making of the order. *Thompson v. Wheeler*, 29-479.

Order appointing a receiver is not reviewable. *K. R. M. v. A. T. & S. F. R. R.*, 31-90.

Motion to quash summons, because surety on cost bond was an attorney, is not reviewable while the case is still pending. *Potter v. Payne*, 31-218.

The order overruling the motion for a new trial, we think was a final order, within the meaning of said §§ 556 and 542 of the civil code; and if it was, then we think that we not only have power and jurisdiction to adjudicate and determine with regard to the distinctive ruling of the court below in making the order overruling such motion, but we also, and as a necessary consequence, have the power and jurisdiction to review and consider every question and every action or ruling of the court below fairly involved in the final determination of such motion. Case-made was not filed within one year after rendition of final judgment, but within one year after ruling on motion for new trial. *Osborne v. Young*, 28-774.

An order for alimony, *pendente lite*, cannot be taken to the supreme court by proceedings in error, before the final disposition of the action in the district court. *Earls v. Earls*, 26-178.

If upon final process the decision of a motion to set aside the sale of property claimed to be exempt is not conclusive, *a fortiori*, ruling of a motion to set aside a seizure upon *mesne* process should not be conclusive. It will be noticed that the statute provides expressly for a ruling and decision upon questions affecting the truth of the affidavit, and consequent sufficiency of the attachment proceedings, and for a review in this court by proceedings in error of the decision of the district court on a motion to dissolve an attachment. *Watson v. Jackson*, 24-443.

Judgment of district court; case tried by a jury will not be set aside on account of error in receiving evidence or in instructions, when it appears that a motion for a new trial on account of such error has been overruled because not filed in time. *Nesbit v. Hines*, 17-319.

Error will lie from an order of the district court that vacates and sets aside an order of delivery, and the party need not wait until the termination of the action. *Kennedy v. Beck*, 15-556.

Error will lie on denial of motion for a temporary injunction. *Akin v. Davis*, 14-144.

Where the answer contains two defenses, each sufficient, and a demurrer is sustained to one, the defendant may take that question to the supreme court, notwithstanding trial on the other. *Gilchrist v. Schmidling*, 12-270.

Petition in error will lie from order granting a new trial while the cause is pending in the district court. *City of Ottawa v. Washabaugh*, 11-126.

Leave given to file an amended bill of particulars is not reviewable in this court before a final disposition of the case below. *Stebbins v. Laird*, 10-232.

An order setting aside a default, and allowing defendants to answer, is not reviewable pending the trial in district court. *McCulloch v. Dodge*, 8-478.

Overruling motion to vacate appointment of receiver, is not reviewable. *Hottenstein v. Conrad*, 5-250.

Where a new trial has been granted by the district court, the supreme court will require a stronger case for interference than where one has been refused. *Field v. Kinnear*, 3-233.

(*Comp. Laws 1862*, § 526.) The denial of a motion to dismiss an action made by the defendant, is not one of the orders of the district court from which error lies to this court until the final disposition of the action. *Brown v. Kimble*, 5-80.

(*Code 1859*, § 526.) Order of confirmation of a sale is clearly an order made upon a summary application after judgment, and as certainly affects a substantial right, the right of the purchaser to receive a conveyance of the property, and of the judgment creditor to receive the purchase-money, (§ 449 of the code,) and is therefore accurately described as a final order by § 524, code 1859. *Koehler v. Ball*, 2-170.

(*Code 1859*, § 526.) The supreme court may reverse or modify an order of the district court that grants or refuses a new trial. *Backus v. Clark*, 1-304.

(4356) **§ 543. Final Order Defined.** An order affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment, is a final order, which may be vacated, modified or reversed, as provided in this article.

Where a judge of the district court makes an order at chambers appointing a receiver, such order of itself and alone is not reviewable by the supreme court. (5-249.) *K. R. M. Co. v. A. T. & S. F. R. R.*, 31-90.

Overruling motion to quash and set aside a summons, upon the ground that the surety on the cost bond was an attorney at law, is not of itself and alone, and while the case is still pending in the district court, undisposed of, a sufficient judgment or order upon which to maintain a petition in error to the supreme court. *Potter v. Payne*, 31-218.

After a judgment is rendered a motion is made to re-tax costs, due notice is given, the parties appear, the question is distinctly presented and decided, and time given to make a case for review. *Held*, That the plaintiff in such motion cannot treat the decision thereon as a nullity. Again, the decision of the motion was an order affecting a substantial right, made upon a sum-

mary application in an action after judgment, and therefore a final order, and subject to review in this court. *Commissioners v. McIntosh*, 30-236.

The supreme court has no authority to reverse, vacate or modify any judgment or order made by the probate court, or made by the judge of the probate court while acting in the capacity of judge of the probate court. *Anderson v. Commercial Bank*, 27-162.

The order for temporary alimony is not a final order, within the definition of such order given in § 543. *Earls v. Earls*, 28-178.

An order setting aside a default, and allowing the defendant to answer, is not reviewable pending the trial in the district court. *McCulloch v. Dodge*, 8-478.

Proceedings against bail, and to apply money deposited in lieu of bail, in criminal actions, are themselves special proceedings, and *quasi* civil. *Morrow v. State*, 6-227.

An order of reference is not reviewable until after final judgment. *Savage v. Challiss*, 4-319.

(*Code 1859, § 524.*) The principle that, if the record shows the final judgment to be erroneous, it is the right of the party aggrieved to have it reversed, vacated or modified, held to apply to final orders made in an action after judgment; and *held*, that the order to confirm the sale in this case was reviewable by the supreme court, without exception taken in the court below. *Koehler v. Ball*, 2-160.

(4857) § 544. Proceedings to Reverse, Vacate or Modify. The proceedings to obtain such reversal, vacation or modification, shall be by petition, to be entitled petition in error, filed in a court having power to make such reversal, vacation or modification, setting forth the errors complained of; and thereupon a summons shall issue and be served, or publication made, as in the commencement of an action. A service on the attorney of record, in the original case, shall be sufficient. The summons shall notify the adverse party that a petition in error has been filed in a certain case, naming it, and shall be made returnable on or before the first day of the term of the court, if issued in vacation, and ten days before the commencement of the term. If issued in term time, or within ten days of the first day of the term, it shall be returnable on a day therein named. If the last publication or service of the summons shall be made ten days before the end of the term, the case shall stand for hearing at that term.

Leave given to make case in twenty days, and case not made within that time, and not till after term of office of judge who tried the case expired; a statement of fact then certified to by the ex-judge, and not in the case-made or proceedings of the court, will not be considered. *Bartlett v. Feeney*, 11-602.

When a *bona fide* attempt to commence a proceeding in error is made, by

filing a petition in error and case-made, as was done in the present case, and having summons issued thereon, such act should be deemed and held to be equivalent to the commencement of such proceedings in error; provided, of course, that the plaintiff in error should faithfully, properly and diligently follow up his attempt by obtaining service upon the defendant in error within sixty days after the filing of the petition. *Thompson v. W. & W. Manfg. Co.*, 29-481.

(*Code 1859, § 527.*) Any error not so set forth in the petition in error is, therefore, not complained of, but waived by the party, and the court will not consider it. *Brown v. Rhodes*, 1-304.

(4358) **§ 545. Summons on Petition in Error; Service.** The summons mentioned in this last section shall, upon the written precept of the plaintiff in error or his attorney, be issued by the clerk of the court in which the petition is filed, to the sheriff of any county in which the defendant in error or his attorney of record may be; and if the writ issue to a county other than that in which the petition is filed, the sheriff thereof may return the same by mail to the clerk, and shall be entitled to the same fees as if the same had been returnable to the district court of the county in which such officer resides. The defendant in error, or his attorney, may waive, in writing, the issuing or service of the summons.

(4359) **§ 546. Transcript; Filing.** The plaintiff in error shall file with his petition a transcript of the proceedings, containing the final judgment or order sought to be reversed, vacated or modified, or the original case-made, as hereinafter provided, or a copy thereof. [L. 1870, ch. 86, § 1 (§ 546, as amended); took effect May 12, 1870.]

(*Laws 1870, § 546.*) When the plaintiff in error files with the petition in error nothing but a copy of the bill of exceptions, the supreme court cannot reverse the order or judgment of the court below, and especially so where such bill of exceptions does not purport to contain all the record of the case, or all the proceedings had therein. *Whitney v. Harris*, 21-96.

(*L. 1870, § 546a; L. 1871, § 546a.*) On 26th July, 1875, court made special findings. Same day the defendant filed a motion for a new trial, but on same day the court adjourned *sine die* without taking any action upon said motion for a new trial. Said motion was therefore continued to next term. A case may be made and served within three days after an order is entered overruling a motion for a new trial, although such order may not be entered until next term thereafter; and the court may, on entering said order, extend the time still further for making and serving the case. *Life Insurance Co. v. Twining*, 19-349.

A paper purporting to be a case-made, but not attested by the clerk of the district court, and not having the seal of the court attached thereto, and filed beyond the trial term, will not be reviewed by the supreme court

for alleged errors, when challenged for want of the statutory authentication. *Karr v. Hudson*, 19-475.

Instructions not embodied in a formal bill of exceptions, nor signed by the judge of the court below, as provided by statute, nor embodied in a case-made for the supreme court, form no part of the record, and will not be considered by the supreme court. *Kshinka v. Cawker*, 16-64.

(4360) § **546a. Case-Made Attached; Costs.** That in all actions hereafter instituted by petition in error in the supreme court, the plaintiff in error shall attach to and file with the petition in error the original case-made, filed in the court below, or a certified transcript of the record of said court; and in no such action hereafter instituted in the supreme court shall any charge, fees or costs be taxed or allowed for making any copy of any paper filed in said action, except for one copy of said petition in error and case-made, or transcript, when such copy shall be ordered by the court for its use, and the same has not been furnished by the plaintiff in error thirty days before the first day of the term at which the case shall stand for hearing, and no costs or fees shall be taxed for making a complete record in such case, except when the same shall be made by request of a party to the suit and at his own costs. [L. 1877, ch. 185, § 1; took effect March 16, 1877.]

(4361) § **547. Case-Made.** A party desiring to have any judgment or order of the district court, or a judge thereof, reversed by the supreme court, may make a case, containing a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of to the supreme court.

Before an action in district court to set aside case-made can be sustained, it must appear that the case-made is untrue, as well as that the signature of the judge was fraudulently obtained. *K. P. R. R. v. Simpson*, 11-494.

When the facts do not appear, the refusal of a judge to sign a case-made cannot be corrected on error. *North v. Moore*, 8-144.

The case-made, or the certificate of the judge, must show what question is to be reviewed by supreme court. *Morgan v. Chapple*, 10-216.

When the case was settled and signed by the court, the following words were inserted at the instance of the defendants, and against the objections of the plaintiffs, to-wit, "The foregoing is all the evidence introduced on the trial of this action;" not error. *Gulf R. R. v. Wilson*, 10-110.

(4362) § **548. Case-Made Served; Amendments, etc.** The case so made, or a copy thereof, shall, within three days after the judgment or order is entered, be served upon the opposite party or his attorney, who may within three days thereafter suggest amendments thereto in writing, and present the

same to the party making the case, or his attorney. The case and amendments shall be submitted to the judge, who shall settle and sign the same, and cause it to be attested by the clerk, and the seal of the court to be thereto attached. It shall then be filed with the papers in the case. A certified copy thereof shall be filed with the petition in error. The exceptions stated in a case-made shall have the same effect as if they had been reduced to writing, allowed and signed by the judge at the time they were taken. [L. 1871, ch. 114, § 1 (§ 548, as amended); took effect March 2, 1871.]

The original, and not a copy of the case-made, must be attached to the petition in error, and filed with it in this court. *Transportation Co. v. Palmer*, 19-471; *Thompson v. Williams*, 30-114.

The order of April 20, giving sixty days to make a case, spent its force when, on the 16th and 18th days of June following, the case-made was served and amendments suggested. *Taylor v. Mason*, 28-383.

The language of the rule made by district court is general; the purpose is to direct the notice of the time and place of settlement in all cases, and whether the case is made under either § 548 or § 549, and with or without an extension of time. *Jones v. Menefee*, 28-439.

Judgment November 12, 1880; time for making case not extended; January 18, 1881, plaintiff in error served case-made on defendants, and on April 25, 1881, the case was settled and signed. Such a case is a nullity. *Dodd v. Abram*, 27-70.

Effect of the exceptions stated. This statute (L. 1870, § 2, p. 169; L. 1871, § 1, p. 274,) plainly implies that the exceptions are first reduced to writing when the case-made is prepared, and declares that they are to have the same effect as if reduced to writing at the time they were so taken. And the time in which they may be so reduced to writing is as extensive as the time for making the case. *Denny v. Faulkner*, 22-92.

Neither a probate court nor a probate judge has any authority to settle or sign a case-made; such power exists only in a district judge or district court. (5-654.) *Baker v. Hentig*, 22-324.

The time for making and serving a case, to enable the supreme court to review the rulings of the district court down to the rendering of said judgment, and prior to and independent of any ruling upon the motion for a new trial, was limited by law to only three days after the rendition of the judgment. (Laws 1871.) *Ingersoll v. Yates*, 21-93.

Where the court below gives three days to make a case, and the same is served on the day such order is allowed, and on the same day settled, certified, signed, sealed and filed, without notice or suggestion of amendments or appearance of opposite party, the petition in error presents no case for review. *Weeks v. Medler*, 18-425.

Case-made containing instructions should be signed by the judge. *Kshinka v. Cawker*, 16-64.

Sixty days' time given to make, serve and file a case; not served until

sixty-three days have elapsed; and then, on that day, served, settled, certified, signed, attested, sealed and filed, without notice to or suggestion of amendments or appearance by opposite party; petition in error should be dismissed. *J. C. & Ft. K. Rld. v. Wingfield*, 16-217.

(*Gen. Stat.*, § 548.) A judge *pro tem.* may, after the expiration of the term, settle and sign a case-made, if within the time allowed by law. *M. K. & T. Rly. v. City of Fort Scott*, 15-435.

An extension of time for making and serving case, does not take away the three days for the suggestion of amendments, and such latter time commences to run from the expiration of the period of extension. *M. K. & T. Rly. v. City of Fort Scott*, 15-435.

Filing a case-made in a reasonable time after settling and signing, is sufficient. *Quære*: Would an unreasonable delay in filing affect its validity. *Lownsberry v. Rakestraw*, 14-151.

When case was settled and signed by the court, the following words were inserted at the instance of the defendants, and against the objection of the plaintiffs, to wit, "The foregoing is all the evidence introduced on the trial of this action;" not error. *Gulf Rly. v. Wilson*, 10-110.

(*Laws 1865*, p. 130.) An indorsement by the opposing attorneys, as follows, "We consent to within bill of exceptions," is a waiver of filing the same out of time. *Drake v. Dodsworth*, 4-160.

(4363) § 549. **Extension of Time; Signing, etc.** The court or judge may, upon good cause shown, extend the time for making a case, and the time within which the case may be served; and may also direct notice to be given of the time when a case may be presented for settlement after the same has been made and served, and amendments suggested, which when so made and presented shall be settled, certified and signed by the judge who tried the cause; and the case so settled and made shall thereupon be filed with the papers in the cause. And in all causes heretofore or hereafter tried, when the term of office of the trial judge shall have expired, or may hereafter expire before the time fixed for making or settling and signing a case, it shall be his duty to certify, sign or settle the case in all respects as if his term had not expired; and if no amendments are suggested by the opposing party, as above provided, said case shall be taken as true and containing a full record of the cause, and certified accordingly. [L. 1870, ch. 85, § 1 (§ 549, as amended); took effect March 3, 1870.]

Signing and certifying a case-made, after the judge who tried the case ceased to be a judge, is valid, if such act was during the time fixed for making the case. *St. L. & S. F. Rld. Co. v. Corser*, 31-707.

The statute has made special provision for the signing and settling of cases by the trial judge after the expiration of his term of office, when his term of office shall expire during the time fixed for making or settling and

signing a case, and he cannot act in any other way, or under any other circumstances, than those named in the statute. *St. L. & S. F. R. R. v. Corser*, 31-706.

We perceive no reason for holding this section unconstitutional. *Gruble v. Wood*, 27-538.

Rule of district court in regard to notice of settlement of case-made, held valid. *Jones v. Menefee*, 28-439.

Time for making and serving a case may be extended. *Ingersoll v. Yates*, 21-94.

The extension of the time for making and serving a case does not take away the three days for suggesting amendments. *M. K. & T. Rly. v. Fort Scott*, 15-478.

When after trial a judgment is entered, and sixty days given to make a case, and within sixty days a case is made and served, and amendments suggested: *Held*, That supplementary proceedings had after the service of the case, and suggestions, and after the expiration of the sixty days, cannot be incorporated into that case-made, but must be preserved by a new case-made or bill of exceptions. *Taylor v. Mason*, 28-381.

Case-made may be served upon the opposite party at any time within three days after an order is entered overruling motion for new trial, although such order may not be entered at the same time that the judgment in the case is rendered, nor even until the next term. *Life Ins. Co. v. Twining*, 19-367.

Failure to serve case-made within proper time is fatal to its validity. *J. C. & Ft. K. Rld. v. Wingfield*, 16-217.

Facts must be stated in the case, and not in the certificate of the judge. *Bartlett v. Feeney*, 11-594.

(4364) **§ 550. Transcript to be Furnished.** Judges of probate courts, justices of the peace, and other judicial tribunals having no clerk, and the clerks of every court of record, shall, upon request, and being paid the lawful fees therefor, furnish an authenticated transcript of the proceedings containing the judgment or final order in said court, or of a case-made, to either of the parties to the same, or to any person interested in procuring such transcript.

This section gives no authority to make a case, but only points out the mode of obtaining authenticated copies of record. *Baker v. Hentig*, 22-324.

(4365) **§ 551. Stay; Judgment; Undertaking.** No proceeding to reverse, vacate or modify any judgment or final order rendered in the probate court or district court, except as provided in the next section, and the fourth subdivision of this section, shall operate to stay execution, unless the clerk of the court in which the record of such judgment or final order shall be, shall take a written undertaking, to be executed on the part of the plaintiff in error, to the adverse party, with one or more

sufficient sureties, as follows: *First*, When the judgment or final order sought to be reversed directs the payment of money, the written undertaking shall be in double the amount of the judgment or order, to the effect that the plaintiff in error will pay the condemnation money and costs, in case the judgment or final order shall be affirmed, in whole or in part. *Second*, When it directs the execution of a conveyance or other instrument, the undertaking shall be in such a sum as may be prescribed by any court of record in this state, or any judge thereof, to the effect that the plaintiff in error will abide the judgment, if the same shall be affirmed, and pay the costs. *Third*, When it directs the sale or delivery of possession of real property, the undertaking shall be in such sum as may be prescribed by any court of record in this state, or any judge thereof, to the effect that during the possession of such property by the plaintiff in error, he will not commit, or suffer to be committed, any waste thereon, and if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the date of the undertaking until the delivery of the possession, pursuant to the judgment, and all costs. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising from the sale, the undertaking must also provide for the payment of such deficiency. *Fourth*, When it directs the assignment or delivery of documents, they may be placed in the custody of the clerk of the court in which the judgment was rendered, to abide the judgment of the appellate court, or the undertaking shall be in such sum as may be prescribed as aforesaid, to abide the judgment and pay costs, if the same shall be affirmed.

(4366) § 552. **Substitute for Undertaking.** Instead of the undertaking prescribed in the second subdivision of the last section, the conveyance or other instrument may be executed and deposited with the clerk of the court in which the judgment was rendered or order made, to abide the judgment of the appellate court.

(4367) § 553. **Stay of Order Made in Vacation.** No proceeding to reverse, vacate or modify an order made in vacation shall operate to stay the effect of such order until the party taking such proceeding shall execute to the adverse party an undertaking, with one or more sufficient sureties, to be approved by the clerk, that if the order be affirmed, in whole or in part, he will pay the opposite party all damages that he may sustain by reason of such proceedings, and all costs in the supreme court.

(4368) **§ 554. Undertaking; When Stay.** Before an undertaking shall operate to stay execution of the judgment or order, a petition in error must be filed in the appellate court, and the execution of the undertaking and the sufficiency of sureties must be approved by the court in which the judgment was rendered or order made, or by the clerk thereof; and the clerk shall indorse said approval, signed by himself, upon the undertaking, and file the same in his office, for the defendant in error.

The undertaking may be filed first, or the petition in error first. *Stillings v. Porter*, 22-19.

(4369) **§ 555. Enforcement; Judgment for Payment of Money.** In an action arising on contract for the payment of money only, notwithstanding the execution of the undertaking in the last section mentioned, to stay proceedings, if the defendant in error give adequate security to make restitution in case the judgment is reversed or modified, he may, upon leave obtained from the court below, or a judge thereof in vacation, proceed to enforce the judgment. Such security must be an undertaking, executed to the plaintiff in error, by at least two sufficient sureties, to the effect that if the judgment be reversed or modified, he will make full restitution to the plaintiff in error, of the money by him received under the judgment.

The action was one brought by the sureties on a promissory note against the principal thereon, to recover moneys which they had been compelled to pay to the holder. This action was on a contract. In all such cases a discretion was given to the court or judge to permit the enforcement of the judgment, the proceedings in error notwithstanding. *Water Power Co. v. Brown*, 23-696.

"Please let Mr. S. and family have whatever they want for their support, and I will repay you for the same," is not a contract for the payment of money only, within the meaning of § 555. *Grant v. Dabney*, 19-391.

And where a judgment was rendered on such a contract in favor of plaintiff, and the defendant then took the case to the supreme court, giving bond under §§ 551 and 554, the plaintiff would have no right to give the undertaking prescribed by § 555, and obtain leave to enforce said judgment. *Grant v. Dabney*, 19-391.

(4370) **§ 556. Limitation; Reversing; Vacating Judgment.** No proceeding for reversing, vacating or modifying judgments or final orders shall be commenced unless within one year after the rendition of the judgment or making of the final order complained of, or in case the person entitled to such proceeding be an infant, a person of unsound mind, or imprisoned within one year as aforesaid, exclusive of the time

of such disability. [L. 1881, ch. 126, § 2 (§ 556, as amended); took effect May 10, 1881.]

Proceedings in error in the supreme court cannot be instituted after the lapse of one year after the rendition of the judgment. *Coöperative Association v. Rohl*, 32-665.

This section, as amended in 1881, was not intended to have, nor can have, the force or effect to change or modify § 7, ch. 79, L. 1871; C. L. 1879, ch. 36. *State v. Smith*, 31-131.

Judgment rendered August 24, 1881, but not entered on the journal till December 19, 1882, at which time a *nunc pro tunc* entry was on motion and notice ordered and made, showing the judgment as of date August 24, 1881; petition in error filed December 10, 1883, is too late. *Brown v. Clark*, 31-521.

Judgment of divorce in vacation, void, and error will lie, although plaintiff in error had no right to file motion for new trial or enter notice of intention to prosecute proceedings in error. *Earls v. Earls*, 27-542.

Where a *bona fide* attempt to commence a proceeding in error is made, by filing a petition in error and case-made, as was done in the present case, and having summons issued thereon, such act should be deemed and held equivalent to the commencement of such proceeding in error; provided, of course, that the plaintiff in error should faithfully, properly and diligently follow up his attempt by obtaining service upon the defendant in error within sixty days after the filing of the petition. *Thompson v. W. & W. Co.*, 29-481.

The case-made was not filed in this court within one year after the rendition of the final judgment, yet it was so filed within less than one year after the plaintiff's motion for a new trial was heard and overruled, and therefore we think that this court has ample jurisdiction to hear and determine any question and every question that was involved in the motion for a new trial. *Osborne v. Young*, 28-774.

More than one year having intervened between the rendition of judgment in this case in the district court, and the filing of the petition in error in this court, this court is without jurisdiction to review such judgment. *Dodd v. Abram*, 27-69.

The case was not brought to this court until more than one year after the rendition of the judgment in the court below; hence, we have no jurisdiction of the case. *Bennett v. Dunn*, 27-194.

(C. L. 1879.) Case not reviewable by supreme court three years after judgment. *Lamme v. Schilling*, 25-94.

(Code 1859, § 535.) The supreme court cannot enlarge the time in which a writ of error can be sued out, nor will it obtain jurisdiction by an order of revivor subsequently issued. *Morell v. Massa*, 1-225.

(4371) §557. **Stay on Judgment of Justice.** No proceeding to reverse, vacate or modify any judgment or final order of a justice of the peace shall operate as a stay of execution, unless the clerk of the district court, in which such proceeding is commenced, shall take a written undertaking to

the defendant in error, executed on the part of the plaintiff in error, by one or more sureties, to be approved by the clerk, to the effect: *First*, When the judgment directs the payment of money, that the plaintiff will pay all costs which have accrued or may accrue in such proceedings in error, together with the amount of any judgment that may be rendered against the plaintiff in error, either upon and after the affirmation thereof in the district court, or on the further trial of the case in such court, after the judgment of the court below shall have been set aside or reversed. *Second*, When the judgment directs the delivery of the possession of lands or tenements by the plaintiff in error, he will not commit or suffer to be committed any waste thereon; and if the judgment be affirmed by the court above, or if judgment be rendered against the plaintiff upon the further trial of the case, after the judgment of the court below shall have been set aside or reversed, that he will pay double the value of the use and occupation of the property, from the date of the undertaking until the delivery of the property, pursuant to the judgment, and all damages and costs that may be awarded against him.

(4372) **§ 558. Stay of Other Judgments.** Execution of the judgment or final order of any judicial tribunal, other than those enumerated in this article, may be stayed on such terms as may be prescribed by the court or judge thereof, in which the proceedings in error are pending.

(4373) **§ 559. Proceedings; Mandate.** When a judgment or final order shall be reversed, either in whole or in part, in the district court or supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment. The court reversing such judgment or final order shall not issue execution in causes that are removed before them on error, on which they pronounce judgment as aforesaid, but shall send a special mandate to the court below, as the case may require, to award execution thereupon; and such court, to which such special mandate is sent, shall proceed in such cases in the same manner as if such judgment or final order had been rendered therein. In cases decided by the supreme court, when the facts are agreed to by the parties, or found by the court below, or a referee, and when it does not appear, by exception or otherwise, that such findings are against the evidence in the case, the supreme court shall send a mandate to the court below, directing it to render such judg-

ment in the premises as it should have rendered on the facts agreed to or found in the case.

If the conclusion of law is erroneous, and the findings of facts do not sustain the judgment, it is our duty to reverse the judgment, and direct the trial court to render such judgment in the premises as it should have rendered on the facts found in the case. *Snyder v. Bell*, 32-232.

Where it does not appear that the findings are against the evidence, it is the duty of this court to send a mandate to the court below directing it to render such judgment in the premises as it should have rendered on the facts found. *Douglass v. Anderson*, 32-353.

The difficulty arises when the "facts agreed to" and the "facts found" differ from each other. In such a case we think we should follow the facts agreed to, and wholly ignore the facts found. (7-308.) *Brown v. Evans*, 15-90.

Where there is a special verdict, and no exceptions thereto, and no motion for further findings or for a new trial, and a judgment is rendered on the verdict, and the supreme court determines that the verdict is not sufficient to sustain the judgment, such court has no power to send the case back for a new trial, but must order a judgment on the verdict for the defendant. *McGonigle v. Gordon*, 11-167.

The "facts agreed to," mentioned in § 559, which authorize the supreme court to direct the district court "to render such judgment in the premises as it should have rendered on the facts agreed to," are such facts as are agreed to in the district court, and not such as may be agreed to in the supreme court. *Jones v. Scott*, 10-37.

If there are any facts not presented by the party aggrieved, the adverse party has a right to insist that such facts shall be inserted in the case-made, or bill of exceptions, before it is signed. *Glass Co. v. Ludlum*, 8-46.

(4374) **§ 560. Opinions; Filing.** It shall be the duty of the judges of the supreme court to prepare, and file with the papers in each case, full notes of the opinion of the court upon the questions of law arising in the case, within sixty days after the decision of the same; and the opinion so filed shall be treated as a part of the record in the case, but no costs shall be charged therefor, except for copies thereof ordered by a party; and no mandate shall be sent to the court below, until the opinion provided for by this section has been filed.

(4375) **§ 561. Syllabus.** A syllabus of the points of law decided in any case in the supreme court shall be stated, in writing, by the judge delivering the opinion of the court, and filed with the papers of the case, which shall be confined to points of law arising from the facts in the case, that have been determined by the court; and the syllabus shall be submitted to the judges concurring therein, for revision before filing thereof, and it shall be filed with the papers without alteration, un-

less by consent of the judges concurring therein; and a copy of such syllabus shall, in all cases, be sent to the court below, by the clerk of the supreme court, with the mandate provided for by section five hundred and fifty-nine of this act.

(4376) **§ 562. Costs on Error.** When a judgment or final order is reversed, the plaintiff in error shall recover his costs, including the costs of the transcript of the proceedings, or case-made, filed with the petition in error, and when reversed in part and affirmed in part, costs shall be equally divided between the parties.

Costs equally divided in this case. *Green v. Dunn*, 5-262.

(4377) **§ 563. Neglect of Clerk.** A mistake, neglect or omission of the clerk shall not be a ground of error, until the same has been presented and acted upon in the court in which the mistake, neglect or omission occurred.

This section does not prevent error being taken to the supreme court, when a trial was had at an adjourned term, of a case that had been continued for the term. *Sawyer v. Bryson*, 10-201.

(4378) **§ 564. Writs Abolished.** Writs of error and *certiorari*, to reverse, vacate or modify judgments or final orders, in civil cases, are abolished; but courts shall have the same power to compel complete and perfect transcripts of the proceedings containing the judgment or final order sought to be reversed, to be furnished, as they heretofore had under writs of error and *certiorari*.

(4379) **§ 565. Costs when Judgment of Justice Affirmed.** If the judgment of a justice of the peace, taken on error, as herein provided, to the district court, be affirmed, it shall be the duty of such court to render judgment against the plaintiff in error for the costs of suit, and award execution therefor; and the court shall thereupon order the clerk to certify its decision in the premises to the justice, that the judgment affirmed may be enforced, as if such proceedings in error had not been taken; or such court may award execution to carry into effect the judgment of such justice, in the same manner as if such judgment had been rendered in the district court.

(4380) **§ 566. Costs when Reversed.** When the proceedings of a justice of the peace are taken in error to the district court, in the manner aforesaid, and the judgment of such justice shall be reversed or set aside, the court shall render judgment of reversal, and for the costs that have occurred up to that time, in favor of the plaintiff in error, and award

execution therefor; and the same shall be retained by the court for trial and final judgment, as in cases of appeal.

This section applies only to cases which may be retained, and which are retained, for trial and final judgment in the district court; and it does not apply to such cases as this, where the cause should be remanded, and is remanded, to the justice of the peace for final trial and judgment. *Stager v. Harrington*, 27-425.

On reversing, upon petition in error, the judgment of a justice of the peace, it is the duty of the district court to render judgment against the defendant in error for all costs that have accrued up to that time. *Loring v. Lockwood*, 13-182.

In 1867 the legislature expressly declared that no pleadings should be necessary in appeal cases, where the amount in controversy is less than \$100. (L. 1867, p. 78, § 9.) *Albinson v. Roberts*, 13-163.

Justices of the peace have no jurisdiction of a suit against a school district, where the amount exceeds \$100; but when the defendant appeals to the district court on error, and the case is reversed, the district court should retain and try the case. *Jones v. School District*, 8-363.

(4381) **§ 567. Review of Certain Orders; Attachment; Injunction.** That when an order, discharging or modifying an attachment or a temporary injunction, shall be made in any case, and the party who obtained such attachment or injunction shall except to such order, for the purpose of having the same reviewed in the supreme court upon petition in error, the court or judge granting said order shall, upon application of the proper party, fix the time, not exceeding thirty days from the discharge or modification of said attachment or injunction, within which such petition in error shall be filed; and during such time the execution of said order shall be suspended, and until the decision of the case upon the petition in error, if the same shall be filed; and the undertaking given, upon the allowance of the attachment, shall be and remain in force until the order of discharge shall take effect. If such petition in error shall not be filed within the time limited, the order of discharge shall become operative and be carried into effect; and the certificate of the clerk of the supreme court that such petition is or is not filed, shall be evidence thereof.

PROCEEDINGS TO REVERSE, VACATE OR MODIFY JUDGMENTS AND ORDERS IN THE COURTS IN WHICH THEY ARE RENDERED.

(4382) **§ 568. Vacating or Modifying Judgments in District Court.** The district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made: *First*, By granting a new trial for the cause, within the time and in the

manner prescribed in section three hundred and ten. *Second*, By a new trial granted in proceedings against defendants constructively summoned, as provided in section seventy-two. *Third*, For mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order. *Fourth*, For fraud, practiced by the successful party, in obtaining the judgment or order. *Fifth*, For erroneous proceedings against an infant, or a person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings. *Sixth*, For the death of one of the parties before the judgment in the action. *Seventh*, For unavoidable casualty or misfortune, preventing the party from prosecuting or defending. *Eighth*, For errors in a judgment, shown by an infant in twelve months after arriving at full age, as prescribed in section four hundred and thirteen. *Ninth*, For taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment.

Illness of party to suit in the district court, on the day set for trial, so severe as to confine him to his house and prevent him from attending court, is such unavoidable casualty or misfortune preventing him from prosecuting or defending as entitles him to have the judgment rendered against him on that day vacated and set aside. *Gheer v. Huber*, 32-319.

Sections 568 to 575, inclusive, are made applicable to courts of record only, and do not apply to justices' courts. *Shaw v. Rowland*, 32-157.

A party may have a good defense to an action, but if he fail to make such defense when the case is called for trial, he will not be permitted to come in weeks afterward and say that the judgment was wrong and ought to be set aside, simply because he had a good defense. The same rule applies to an order, of course. *Iliff v. Arnott*, 31-674.

Casualty or misfortune of attorney, prevented from attending court, may sometimes be client's casualty or misfortune. *Welch v. Challen*, 31-704.

Petition by defendant, after the adjournment of court, for vacating judgment and for new trial, on the ground that the original judgment was obtained by the fraud, conspiracy and perjury of the original plaintiff. It partakes to a very great extent of the nature of an action itself, and therefore should be tried upon legal evidence, and an affidavit of a witness cannot be used as original evidence upon the merits of the case, when the witness himself is present in court under subpoena, and his oral testimony can be taken and used in the case. *Fullenwider v. Ewing*, 30-15.

Motion for new trial, filed at the term at which the original trial was had and the original judgment rendered, upon grounds authorized by the statute. It was not filed within three days after the decision of the court, but the court found that the defendant was unavoidably prevented from making an appearance on the day of trial, or from filing the motion for a new trial at an earlier date; this was sufficient. *Hemme v. School Dist.*, 30-380.

Having the parties before him, sufficient appears by the record and affidavits, on the application to open the judgment, to authorize the order granting the stay of proceedings until the next term of the court was held, and the parties had an opportunity to present their applications at court. (24-167.) *Morrill v. Janes*, 28-150.

No fraud or irregularity shown in this case; but if there was failure to ask for new trial within two years, it is a bar. *Lamme v. Schilling*, 25-95.

When the court, on the hearing of a motion to vacate a judgment, under subd. 3, § 568 of the code, becomes satisfied that such judgment was obtained irregularly, within the meaning of said subdivision, and therefore that the party making the motion is entitled to have an opportunity to show that he has a good cause of action or defense, as the case may be, the court should then vacate the judgment; but generally, however, upon the condition that the moving party shall first make such showing. *Meixell v. Kirkpatrick*, 25-17.

The original judgment in the case should, upon such hearing, have been affirmed or vacated, or modified so as to correspond with the evidence introduced on the hearing. If, however, the defendant had wished to make a full defense to the action, it would have been necessary for him to make the same showing that would be required to be made in other cases, to authorize the court to set aside his default and permit him to answer. *Smith v. A. T. & S. F. Rld.*, 25-750.

A judgment rendered against a minor without the appointment of a guardian *ad litem* may be voidable, but is not void. *Walkenhorst v. Lewis*, 24-427.

Delay in this case in filing petition for new trial held inexcusable. *Soper v. Medberry*, 24-133.

By the provisions of § 568 of the code, if the judgment was obtained by perjury, and diligence is shown, the defendant can obtain a vacation of it. *Green v. Bulkley*, 23-137.

We think it is possible, under §§ 568 575, 576 of code, that the plaintiff might have had W.'s settlements in the probate court set aside by the probate court. But this would have been a very inadequate remedy in this case. *Klemp v. Winter*, 23-704.

Where a judgment is rendered against the principal and surety, on a forfeited recognizance, after the death of the principal, the judgment may be vacated under subd. 6 of § 568, as to the principal but not as to the surety. *McLaughlin v. State*, 17-285.

Press of business and overlooking some glaring errors, by counsel, is not unavoidable casualty or misfortune. *Reed v. Wilson*, 13-154.

Judgment had at adjourned term, when the case had been continued for the term, is error; and while it might be corrected by motion in the district court, error will lie to the supreme court. *Sawyer v. Bryson*, 10-201.

The dismissal of an action for want of prosecution may be set aside or vacated for unavoidable casualty or misfortune preventing the party from prosecuting his action, but this must be made affirmatively to appear. *Cole v. Walker*, 7-142.

When "fraud practiced by the successful party" is alleged, the facts showing such fraud must be stated in a plain and concise manner, as in other cases. Mere "knowledge" of certain facts is not sufficient; the fraudulent acts and proceedings of such party, designed and practiced for the purpose of securing an unfair or unjust judgment, must be shown.

When "unavoidable casualty or misfortune" is alleged, the facts must be so stated as to make it appear that no reasonable or proper diligence or care could have prevented the trial or judgment; that is, that the party complaining is not himself guilty of any laches. Business will not excuse non-appearance of an attorney. *Hill v. Williams*, 6-17.

Where a plaintiff, upon false testimony, obtains a judgment against a party not liable, and such party has no knowledge of the pendency of the action until more than one year after judgment, such judgment may be set aside or enjoined. *Adams v. Secor*, 6-542.

(*Code 1859, § 546.*) Application for a new trial, at a term subsequent to the one at which the judgment was rendered, on the ground of newly-discovered evidence, must be made by petition. *Odell v. Sargent*, 3-84.

(*Code 1859, § 546.*) "That a sale was made under an execution levy," * * * that "too much property was levied on and sold to satisfy a debt," are not sufficient grounds to bring a case within any of the causes for which a judgment or order can be reversed, on motion, *after the term* at which the judgment or order was made. *Livingston v. Lamb*, 1-221.

The proper mode pointed out by the code to correct a judgment giving judgment for \$1,037.50, and order of sale to issue in default of the payment of said sum of \$601.25, is by motion, under § 546, subd. 3. *Small v. Douthitt*, 1-339.

To have irregularities of procedure and matters of form, which are subject to amendment and susceptible of legal adjustment, so as to promote substantial justice, corrected, the party aggrieved must first procure the action of the court below thereon. *Palmetto Town Co. v. Rucker*, McC.-147.

(4383) **§ 569. Mistakes, etc.; Motion to Vacate.** The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party or his attorney in the action. The motion to vacate a judgment, because of its rendition before the action regularly stood for trial, can be made only in the first three days of the succeeding term.

(*Code 1859, § 547.*) Party seeking to vacate judgment on account of irregularities which will not prejudice the rights of the case, must first have the court below to act thereon. *Palmetto Town Co. v. Rucker*, McC.-151.

Motion to vacate a judgment under the latter clause of this section can be made at once. *City of Leavenworth v. Hicks*, McC.-161.

(4384) **§ 570. Proceedings; Petition to Vacate or Modify.** The proceedings to vacate or modify the judgment or order, on the grounds mentioned in subdivisions four, five, six,

seven, eight and nine, of section five hundred and sixty-eight, shall be by petition, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On such petition, a summons shall issue and be served as in the commencement of an action.

Petition for new trial on ground of sickness of party, and that he was on the day the suit was set for trial confined to his house by sickness, and because of such sickness was unable to attend court, shows such unavoidable casualty or misfortune preventing him from defending the suit as entitles a new trial. *Gheer v. Huber*, 32-321.

The petition to vacate an order dismissing an action for want of prosecution, must set forth the order complained of, and the grounds for vacating it. *Cole v. Walker*, 7-139.

The petition verified must set forth, (1) the judgment or order complained of; (2) the grounds to vacate or modify it; and (3) the defense to the action, if the party applying was defendant. A petition which does not comply with the statute in setting forth each of these requisites is insufficient. *Hill v. Williams*, 6-17.

(4385) **§ 571. The Same.** The court may first try and decide upon the grounds to vacate or modify a judgment or order before trying or deciding upon the validity of the defense or cause of action.

(4386) **§ 572. Modifying Judgment; Effect on Liens.** A judgment shall not be vacated on motion or petition, until it is adjudged that there is a valid defense to the action on which the judgment is rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action; and where a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment.

A judgment will not be vacated upon petition, upon a mere showing of sufficient excuse for the non-appearance of the party against whom the judgment was rendered, and without a showing of a valid defense to the cause of action. *Anderson v. Beebe*, 22-768.

It is true that § 572 provides that a judgment shall not be vacated on motion, or petition, until it is adjudged that there is a valid defense to the action; but this section, in the nature of things, does not apply to judgments rendered by a court having no jurisdiction of the person of the defendant, and where the judgment, so-called, is a nullity. *Hanson v. Wolcott*, 19-209.

(*Code 1859, § 550.*) For irregularities of procedure and matters of form, which are subject to amendment and susceptible of legal adjustment in practice, so as to promote the claims of substantial justice of the case, we cannot entertain appeals of error in this court till the lower court has acted thereon. *Palmetto Town Co. v. Rucker*, McC.-151.

(4387) **§ 573. Suspending Proceedings; Bond.** The party seeking to vacate or modify a judgment or order, may obtain an order suspending proceedings on the whole or part thereof; which order may be granted by the court, or any judge thereof, upon its being rendered probable, by affidavit, or by exhibition of the record, that the party is entitled to have such judgment or order vacated or modified. On the granting of any such order, the court, or judge, may require the party obtaining any such order to enter into an undertaking to the adverse party to pay all damages that may be caused by granting of the same.

The judge ought perhaps to have required a bond for the payment of all damages, instead of one for the payment of costs, but as both parties were present, and as no exceptions were taken, nor was the attention of the judge directed to the words of § 573, we think the error was waived. *Morrill v. Janes*, 28-150.

(4388) **§ 574. Suspension.** When the judgment was rendered before the action stood for trial, the suspension may be granted, as provided in the last section, although no valid defense to the action is shown; and the court shall make such orders, concerning the executions to be issued on the judgment, as shall give to the defendant the same rights of delay he would have had if the judgment had been rendered at the proper time.

(4389) **§ 575. Limitation; Time of Commencing.** Proceedings to vacate or modify a judgment or order, for the causes mentioned in subdivisions four, five and seven, of section five hundred and sixty-eight, must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant, or person of unsound mind, and then within two years after removal of such disability. Proceedings for the causes mentioned in subdivisions three and six of the same section, shall be within three years, and in subdivision nine, within one year after the defendant has notice of the judgment. A void judgment may be vacated at any time, on motion of a party, or any person affected thereby.

Sections 568 to 575, inclusive, are applicable to courts of record only, and do not apply to justices' courts. *Shaw v. Rowland*, 32-157.

After a decree foreclosing an equitable mortgage had been entered, defendants appeared specially and moved, under § 575, to vacate it as void. *Held*, That no defect in the manner in which facts are alleged in the petition, and no defects of parties which is waived by a failure to demur or

answer, can be considered upon such a motion. *Walkenhorst v. Lewis*, 24-420.

Irregularities in obtaining judgment, or fraud, not shown in this case. *Lamme v. Schilling*, 25-95.

In this state it is held that a judgment rendered without jurisdiction is void; that a personal judgment rendered without notice to the defendant, is rendered without jurisdiction, and is consequently void; that a judgment void for want of notice, may be set aside on a motion made therefor by the defendant; and that this may be done in cases where it requires extrinsic evidence to show the judgment was rendered without notice and without jurisdiction. (2-70; 8-133; 9-674; 19-207; 19-458.) *Reynolds v. Fleming*, 30-111.

A decree restraining defendant and his successors in office, not only from any proceedings to collect the tax of the given year, but also forever thereafter from attempting to collect any subsequent tax upon the said tract, is void as to such subsequent taxes, and may be vacated at any time, on motion, by the general representatives of the county. *Beach v. Schoemaker*, 18-149.

This court will not reverse a judgment on a mere bill of exceptions, when the certificate of the clerk fails to show it is a certified transcript of the record of the court below. *Eckert v. McBee*, 25-706.

A void judgment never starts a statute of limitations running. *Foreman v. Carter*, 9-678.

Where a plaintiff upon false testimony obtains a judgment against a party not liable, and such party has no knowledge of the pendency of the action, until more than one year after judgment, such judgment may be set aside or enjoined. *Adams v. Secor*, 6-542.

(4390) **§ 576. Apply to What Courts.** The provisions of this article, subsequent to section five hundred and sixty-seven, shall apply to all the courts of record of the state, so far as the same may be applicable to the judgments or final orders of such courts.

Proceedings under § 568 to § 575 are by § 576 made applicable to courts of record only. *Shaw v. Rowland*, 32-157.

Irregularities in obtaining judgment, or fraud, not shown in this case. *Lamme v. Schilling*, 25-95.

A court for good reasons, and under the provisions of the civil code, § 568 to § 576, may reverse, vacate or modify any judgment or order rendered or made in its own court. *Ames v. Brinsden*, 25-747.

Under §§ 568, 575, 576, infant might have fraudulent settlement of guardian set aside on coming of age, by the probate court. *Klemp v. Winter*, 23-704.

(4391) **§ 577. Who Need not Give Bond.** Executors, administrators and guardians who have given bond in this state, with sureties, according to law, are not required to give an undertaking on appeal or proceedings in error.

(4392) **§ 578. Five per Cent.** If the district court affirm a judgment on petition in error, it shall also render judgment against the plaintiff in error, for five per cent. upon the amount due from him to defendant in error, unless the court shall enter upon its minutes that there was reasonable grounds for the proceedings in error.

(4393) **§ 579. Summons not Issued; Waiver of Error.** A summons in error shall not be issued in any case in which there is, upon the minutes of the court, or among the files of the case, a waiver of error, by the party, or his attorney, endeavoring to commence such proceedings, unless the court in which the petition is to be filed, or a judge thereof, shall indorse on the same permission to issue such summons.

(4394) **§ 580. Effect of Code; Cases Pending.** Cases pending in appellate courts, or writs of error, or otherwise, when this code takes effect, shall be conducted to final judgment as if it had not been adopted, and the liens of judgments and decrees rendered when it takes effect shall be preserved. They shall be enforced as provided in section seven hundred and twenty-seven [twenty-six]; but process already issued at such time shall be carried on and executed.

ARTICLE 23—COSTS.

SEC.

- 581. Security for costs to be given in all cases; when not required; deposit in lieu of bond, etc.
- 582. Affidavit provided for in preceding section.
- 583. False swearing, perjury.
- 583a. Certain section repealed.
- 584. Defendant may move for additional security, when.
- 585. Judgment against security for costs.
- 586. Informer, under penal statute, shall pay costs, when.
- 587. Defendant disclaiming title shall recover costs, when.

SEC.

- 588. Costs of motions and amendments, how paid.
- 589. When defendant to pay.
- 590. When plaintiff to pay.
- 591. May be divided between parties, when.
- 592. Costs in actions against several parties to same obligation.
- 593. Summons issued to another county may be returned by mail; fees of sheriff.
- 593a. Clerks to tax costs.
- 593b. Repeal.

(4395) **§ 581. Security for Costs.** In any civil action hereafter brought in any district court of this state, before the clerk shall issue summons, there shall be filed in his office, by or on behalf of the plaintiff or plaintiffs, a bond, to be approved by the clerk, conditioned that the plaintiff or plaintiffs will pay all costs that may accrue in said action in case he or they shall be adjudged to pay them, or in case the same cannot be col-

lected from the defendant or defendants if judgment be obtained against him, her, or them, that the plaintiff or plaintiffs will pay the costs made by such plaintiff or plaintiffs: *Provided*, That in any case where the plaintiff or plaintiffs having a just cause of action against the defendant or defendants, by reason of his, her, or their poverty, is or are unable to give such security for costs, on affidavit of the plaintiff or plaintiffs made before the clerk that such is the fact, no bond shall be required: *Provided further*, That in case [of] non-resident plaintiff or plaintiffs, such plaintiff or plaintiffs may deposit with the clerk of the district court such sum or sums as in the opinion of said clerk will be sufficient to cover all costs in case such non-resident plaintiff or plaintiffs become liable to pay the same, and in the case of resident plaintiff or plaintiffs, such plaintiff or plaintiffs may deposit the sum of fifteen dollars, which sum shall be in lieu of all security for costs as herein and otherwise provided. [L. 1875, ch. 121, § 1; took effect May 15, 1875.]

(Same as § 580a C. L. 1879.) Where the plaintiff in a suit in the district court, a resident of the county in which suit is brought, before the issue of a summons, deposits with the clerk of the court the sum of fifteen dollars as security for costs, neither he nor his legal representatives or successors in interest can be required to make any further deposit, or give any further or other security for costs in that suit in that court. *Carr v. Osterhout*, 32-277.

Motion to quash and set aside a summons, upon the ground that the surety on the cost bond was an attorney at law, overruled by the court; such ruling is not of itself and alone, and while the case is still pending in the district court, undisposed of, a sufficient judgment or order upon which to maintain a petition in error in the supreme court. *Potter v. Payne*, 31-218.

The defendant below (plaintiff in error) excepts to the validity of the bond, because it was taken by the clerk in violation of the statute. We think he has the right to so intervene, and ask that the summons shall be quashed and set aside, because the bond required by law has not been executed. *Cook v. Caraway*, 29-43.

(4396) § 582. **Affidavit; Forma Pauperis.** The affidavit provided for in the preceding section shall be in the form following, and attached to the petition, viz.: State of Kansas, _____ County, _____, in the district court of said county: I (or we) do solemnly swear that the cause of action set forth in the petition hereto prefixed is just, and I (or we) do further swear that by reason of my (or our) poverty, I (or we) am (or are) unable to give security for costs. [L. 1875, ch. 121, § 2; took effect May 15, 1875.]

(4397) § 583. **False Swearing.** Any person or persons

willfully swearing falsely in making the affidavit aforesaid, shall, on conviction, be adjudged guilty of perjury, and punished as the law prescribes. [L. 1875, ch. 121, § 3; took effect May 15, 1875.]

(4398) § **583a. Repealed.** Section five hundred and eighty-one of chapter eighty, general statutes of eighteen hundred and sixty-eight, and all acts and parts of acts inconsistent with this act, is [are] hereby repealed. [L. 1875, ch. 121, § 4; took effect May 15, 1875.]

(4399) § **584. Additional Security; When Required.** In an action in which security for costs has been given, the defendant may, at any time before judgment, after reasonable notice to the plaintiff, move the court for additional security on the part of the plaintiff; and if, on such motion, the court be satisfied that the surety has removed from this state, or is not sufficient, the action may be dismissed, unless, in a reasonable time, to be fixed by the court, sufficient security be given by the plaintiff.

The authority to justices of the peace to require security for costs from resident plaintiffs is discretionary. And if this authority of the justice is carried to the district court on an appeal by § 584, or by any other statute, then the authority of the district court is also discretionary. *Eastman v. Godfrey*, 15-342.

The provisions of this section, being the same section and chapter of the general statutes of 1868, are inconsistent with part of § 501, (L. 1875, ch. 121, § 1,) and have no application thereto, or to the suits therein referred to. *Carr v. Osterhout*, 32-280.

(4400) § **585. Judgment against Security for Costs.** After final judgment has been rendered in an action in which security for costs has been given, as required by this article, the court, on motion of the defendant, or any other person having a right to such costs, or any part thereof, after ten days' notice of such motion, may enter up judgment in the name of the defendant or his legal representatives, against the surety for costs, his executors or administrators, for the amount of costs adjudged against the plaintiff, or so much thereof as may be unpaid. Execution may be issued on such judgment as in other cases, for the use and benefit of the persons entitled to such costs.

In an action where security for costs has been given by the plaintiff, and afterward final judgment is rendered against the plaintiff for costs, and afterward certain persons interested in the costs, and seeking to have the said judgment extended under § 585 of the civil code, so as to make it a judgment against the sureties for costs, as well as against the plaintiff, gave

to said sureties the following notice, to-wit: "You will take notice that a motion will be made on behalf of the officers and ex-officers of this court having fees in the above-entitled cause, to take judgment against you as sureties on plaintiff's bond for costs in the above-entitled cause, at one o'clock p. m., February 24, A. D. 1879, or as soon thereafter as counsel can be heard, at the court house at Lyndon. N. F., *Sheriff.*" *Held*, That said notice is sufficient. *Sanford v. Frankhouser*, 24-98.

(4401) **§ 586. Informer; Costs.** If any informer, under a penal statute, to whom the penalty, or any part thereof, if recovered, is given, shall dismiss his suit or prosecution, or fail in the same, he shall pay all costs accruing on such suit or prosecution, unless he be an officer, whose duty it is to commence the same.

(4402) **§ 587. Defendant Recover; Disclaimer.** Where defendants disclaim having any title or interest in land or other property, the subject-matter of the action, they shall recover their costs, unless for special reasons the court decide otherwise.

This section applies to cases where there is a full disclaimer. *Withford v. Horn*, 18-457.

By a disclaimer the defendant does not prevent the plaintiff from obtaining the relief prayed for, but saves himself from all costs. *K. P. Rly. Co. v. McBratney*, 12-13.

Defendant should recover costs on disclaimer, unless for special reasons the court decide otherwise. *K. P. Rly. Co. v. McBratney*, 10-415.

(4403) **§ 588. Costs Taxed and Paid; Discretion.** Unless otherwise provided by statute, the costs of motions, continuances, amendments and the like, shall be taxed and paid as the court, in its discretion, may direct.

New trial on ground of accident, new evidence, or on any ground that concedes adversary without fault; costs should be paid as a condition of granting it; but when new trial is claimed solely on error of court or jury or misconduct of adversary, costs should rarely be taxed against moving party. *N. C. C. M. & S. Co. v. Eakins*, 23-317.

It is seldom, if ever, wrong to tax the costs of the term against the party whose fault necessitates the continuance. (11-74; 17-325; 19-204.) *Hackett v. Turner*, 19-529.

The word expenses (§ 16, Comp. Laws 1862, p. 740) includes fees of officers not fixed by law, but does not include attorney's fees. *Swartzel v. Rogers*, 2-381.

(4404) **§ 589. Defendant to Pay Costs.** Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property.

Where an action is commenced before a justice of the peace, and the defendant offers in writing to allow judgment to be taken against him for a sum less than the amount afterward recovered, and does not make any tender to the plaintiff, does not allege any tender of money in his answer, and does not deposit any money in court, the plaintiff is entitled to costs as of course, upon the judgment in his favor. *King v. Harrison*, 32-215.

The plaintiff recovered judgment for part of the property claimed, and under this section was entitled to his costs. *Reicheneker v. Henry*, 31-29.

In action of ejectment, plaintiff had void tax deed, and lien was allowed for taxes. *Held*, That he should pay all costs in the ejectment suit, and that defendant should pay costs in prosecution of cross-petition to remove cloud on his title. *Finneran v. Coursey*, 31-408.

Suppose an action on a note, in which the plaintiff asks and obtains a judgment for money only, and in which, despite the statute, the court renders judgment against him and in favor of the defendant for costs; notwithstanding the obvious error in such judgment, it is not a nullity. *Mariner v. Mackey*, 25-671.

Replevin; property delivered to plaintiff, and judgment part for each, and each party pay his own costs; latter not reversed, no showing being made as to amount each paid. *Dresher v. Corson*, 23-313.

The defendant files set-off, and referee finds for him; judgment, \$265, and court modifies it to \$130, and taxes all costs in favor of defendant; not error. *Perley v. Taylor*, 21-716.

In an action for the recovery of specific personal property, costs are allowed, of course, to the successful party. *Whitford v. Horn*, 18-457.

(4405) **§ 590. Plaintiff to Pay Costs.** Costs shall be allowed of course to any defendant, upon a judgment in his favor, in the actions mentioned in the last section.

The plaintiff should pay all the costs which accrued in the prosecution of or the defense against the plaintiff's cause of action for the recovery of the property, and the defendant should, in the discretion of the court, pay all costs which accrued in the prosecution of or the defense against their cause of action to remove the cloud from their title. (Plaintiff in ejectment had a void tax deed, and defendant sought to quiet title.) *Finneran v. Coursey*, 31-410.

The defendant files a set-off, and referee finds for him; judgment for \$265, and court modifies it to \$130, and taxes all costs in favor of defendant; not error. *Perley v. Taylor*, 21-716.

Replevin; property delivered to plaintiff, and judgment part for each, and each party pay his own costs; latter not reversed, no showing being made as to amount each paid. *Dresher v. Corson*, 23-313.

(4406) **§ 591. Costs Divided.** In other actions, the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable.

Plaintiff in ejectment had a void tax deed, and defendant sought to quiet title; plaintiff required to pay all costs against his cause of action, and defendant, in discretion of court, should pay all costs which accrued in prosecution or defense of his cause of action. *Finneran v. Coursey*, 31-410.

In civil actions other than for the recovery of money only, and for the recovery of specific real or personal property only, the district court may tax the costs to such parties to the action, and in such proportion as in its discretion it may think right and equitable. *City of Emporia v. Whittlesey*, 20-17.

Where none of the testimony before a referee is preserved in the record, it is impossible for this court to say that there was any error in the modification by the district court of the report of the referee, as to the question of costs, in a case where the taxation of costs is a matter of discretion. *Hottenstein v. Conrad*, 9-442.

(4407) **§ 592. Costs; Several Parties.** Where several actions are brought on one bill of exchange, promissory note or other obligation, or instrument in writing, against several parties who might have been joined as defendants in the same action, as allowed by section thirty-nine, no costs shall be recovered by the plaintiff in more than one of such actions, if the parties proceeded against in the other action were, at the commencement of the previous action, openly within the state.

(4408) **§ 593. Summons; Sheriff's Fees.** When a summons is issued to another county than that in which the action or proceeding is pending, it may be returned by mail, and the sheriff shall be entitled to the same fees as if the summons had issued in the county of which he is sheriff.

(4409) **§ 593a. Clerks to Tax Costs.** The several clerks of the district court shall tax the costs in each case, and insert the same in their respective judgments, subject to retaxation by the court, on motion of any person interested. [L. 1871, ch. 115, § 1 (§ 15 of ch. 87, L. 1870, as amended); took effect March 16, 1871.]

The decision of the motion to retax costs was an order affecting a substantial right, made upon a summary application in an action after judgment, and therefore a final order, and subject to review in this court. *Commissioners v. McIntosh*, 30-236.

The title of a stranger, purchaser on execution sale, will not be defeated by the mere fact that the journal entry of the judgment fails to state the amount of costs taxed. *Merwin v. Hawker*, 31-227.

Judgment for costs, \$——. When they are taxed, if improperly done, the matter should be corrected on motion. *Linton v. Housh*, 4-542.

(4410) **§ 593b. Repeal.** Said original section fifteen, and

sections sixteen, seventeen, eighteen, nineteen and twenty of this* act, to which this is amendatory, are hereby repealed. [L. 1871, ch. 115, § 1 (§ 15 of ch. 87, L. 1870, as amended); took effect March 16, 1871.]

* Laws 1870, ch. 87.

ACTIONS AND PROCEEDINGS IN PARTICULAR CASES.

ARTICLE 24—ACTIONS CONCERNING REAL PROPERTY.

SEC.

594. The parties.
 595. The petition.
 596. The answer.
 597. Petition by tenant in common, against co-tenant.
 598. Recovery, where right terminates during pendency of action.

SEC.

599. Party may demand another trial, when.
 600. No further trial unless for cause shown, or on reversal of judgment.

(4411) **§ 594. Parties; Action to Quiet Title.** An action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate, or interest therein, adverse to him, for the purpose of determining such adverse estate or interest.

If the premises were a homestead, the separate deed of the plaintiff, even if lawfully obtained, did not divest him of title, nor estop him from alleging the deed to be a nullity; and being the owner of the premises and in the possession thereof, he was entitled, under § 594 of the code, to bring his action against the defendant without making his wife a party plaintiff. *Davies v. Cole*, 28-261.

The plaintiff is not proceeding under § 594 of the code, but is seeking a character of relief formerly given in courts of chancery, and has set forth such a state of facts in his petition as under the rules of equity practice would entitle him to relief. Therefore, to succeed, it is not necessary for him to have alleged or shown that he was in the actual possession of the real estate. (16-515.) *Keith v. Keith*, 26-41.

Under § 594 of the civil code, the plaintiff must have actual possession of the property, by himself or tenant, or he cannot maintain the action. *Pierce v. Thompson*, 28-714.

She being in the actual possession of the property, and claiming title thereto, has the right to have her title quieted, provided she has a right to the title, under any rule or rules of law or equity. *Leonard v. Wills*, 24-237.

Defendants in error were required, under § 594 of the code, to show title and actual possession, which they did, and then supplemented this with proof that the plaintiff in error claimed an interest or estate in the land adverse to them. This proof was furnished by the introduction of the quit-

claim deed, but no rule of law or equity binds a party offering in evidence such adverse claim, by the recitals thereof, or by the recitals of the deed upon which the claim is founded. *Douglass v. Huhn*, 24-770.

The plaintiff must allege and prove an actual possession by himself or tenant. An action may be maintained by the holder of the legal title, when not in possession, if the land is vacant. (5-24.) *Douglass v. Nuzum*, 16-518.

Petition under §594 held good in this case against any collateral attack. *Entreken v. Howard*, 16-553.

In an action to quiet the title, under a general denial by the defendant and a plea of specific title, it is not error to admit evidence showing that plaintiff is not the owner, whether specifically set up in the answer or not. *Morrill v. Douglas*, 14-293.

Party in peaceable possession of real estate, claiming title therein, may quiet his title and possession against any adverse claimant whose title is weaker than his. *Giltenean v. Lemert*, 13-481.

Party having lawful and actual possession, has a right to have any adverse interest determined. *Giles v. Ortman*, 11-66.

An action to quiet title may be brought by the holder of the legal title when he is not in possession, if the real estate for which he holds the title is vacant. (5-24.) *O'Brien v. Creitz*, 10-203.

Sec. 599, authorizing a new trial as a matter of course, only applies to suit of ejectment, and does not apply to §594. *Northrup v. Romary*, 6-240.

A person in actual possession may maintain suit to quiet title of real estate against any person claiming to have adverse interest therein. *Brenner v. Bigelow*, 8-496.

The plaintiff must be shown to be in actual possession, either by himself or by tenant, (8-496, 11-65,) but the holder of the legal title not in possession may bring suit if the land is vacant. *Eaton v. Giles*, 5-24.

(4412) §595. Petition; Action for Recovery of Real Property. In an action for the recovery of real property, it shall be sufficient if the plaintiff state, in his petition, that he has a legal or equitable estate therein, and is entitled to the possession thereof, describing the same, as required by section one hundred and twenty-seven, and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived.

Ejectment is a more appropriate remedy than forcible detainer, when party has been in possession over two years with color of title. *Alderman v. Boeken*, 25-661.

Section 599 is intended to apply to actions brought under the prior §595. *Hall v. Sanders*, 25-549.

The only action that could be brought for the recovery of real property, would be an action in the nature of ejectment, such as is provided for by §595. *McCardell v. McNay*, 17-435.

In ejectment, the real party in interest must sue in his own name. *Crowell v. Ward*, 16-61.

Any kind of estate in land, legal or equitable, is sufficient to enable a plaintiff to recover in an action in the nature of ejectment, under § 596, as against a party who had no interest in the property. *Simpson v. Boring*, 16-251.

In a petition in ejectment, it is unnecessary to state how the plaintiff's estate or ownership is derived. It is sufficient to allege that he has a legal or equitable estate. An equitable title is sufficient. *K. P. Rly. v. McBratney*, 12-10.

In action of ejectment, the defendant claiming under a tax deed, the petition need not aver a tender before suit brought, of the taxes, interest and costs paid by defendant. The requisites of a petition in ejectment are prescribed by statute, § 596, and it need not contain any additional averments when the action is for the recovery of the possession only. The fact of tender may be proven under such a petition. If no tender was made, defendant may plead omission, in abatement. *Shelton v. Dunn*, 6-128.

Petition held sufficient in this case, because it conformed to the statute. *Pennock v. Monroe*, 5-588.

(4413) **§ 596. Answer.** It shall be sufficient, in such action, if the defendant, in his answer, deny, generally, the title alleged in the petition, or that he withholds the possession, as the case may be; but if he deny the title of the plaintiff, possession, by the defendant, shall be taken as admitted. Where he does not defend for the whole premises, the answer shall describe the particular part for which defense is made.

In ejectment, under a general denial, the defendant has a right to show, by any legal evidence that he may have, that he is the owner of the property in controversy. (10-364.) *Hall v. Dodge*, 18-279.

When the court instructs the jury correctly, it does not commit error sufficient for reversal, even if it misconstrues one of the pleadings in giving such instruction. *Stark v. Willetts*, 8-208.

(4414) **§ 597. By Tenant.** In an action, by a tenant in common of real property, against a co-tenant, the plaintiff must, in addition to what is required in section five hundred and ninety-five, state, in his petition, that the defendant either denied the plaintiff's right, or did some act amounting to such denial.

(4415) **§ 598. Recovery.** In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover for withholding the property.

(4416) **§ 599. Another Trial.** In an action for the recovery of real property, the party against whom judgment is ren-

dered may, at any time during the term at which the judgment is rendered, demand another trial, by notice on the journal, and thereupon the judgment shall be vacated, and the action shall stand for trial at the next term.

In cases decided by the supreme court, brought on error, when the facts are found by the trial court, and a mandate is sent to that court directing it to render judgment upon the findings for defendant below, the case is not to be retried by the district court upon the old facts, nor upon facts which ought to have been and might have been presented upon the trial. *Duffitt v. Crozier*, 30-150.

Section not passed upon. *City of Topeka v. Russam*, 30-556.

The action brought was an equitable one, and the answer setting up a counter-claim in ejectment did not alter the case. The action brought was not one for the recovery of real property, and the counter-claim was not, within the letter of the statute, an action for the recovery of real property; hence L. was not entitled to a jury trial, or a second trial. *Larkin v. Wilson*, 28-514.

The trial court having treated the original petition and the pleadings thereunder as constituting no cause of action, and the plaintiff having accepted by his subsequent conduct the ruling of the court to be correct, and the parties thereafter having filed a new petition and a new answer, the trial had thereon, at the September term of the court, must be regarded as the first trial, and therefore defendant had the right to demand another trial, by notice on the journal, and the court did not err in vacating said judgment and in setting the action for trial at the following January term. *Beckman v. Richardson*, 28-662.

In regard to the claim for another trial, under § 599, the amended petition and pleadings so changed the character of the original action, that § 599 was not applicable. *Keith v. Keith*, 26-41.

Where a plaintiff thus joins an action in the nature of ejectment to his equitable action to correct a deed, we do not think, as a matter of right, he comes within the provisions of § 599 of the code. He therefore cannot demand, as a matter of right, another trial. (26-26.) *Rogers v. Clemmans*, 26-528.

Within the meaning of "another trial," under the statute, we do not think such second trial is authorized as a matter of right and without any showing, where the judgment is by default, and an assessment of damages only is had. *Hall v. Sanders*, 25-549.

A motion for a second "new trial" in ejectment, is governed by the same rules which govern applications for new trials in other actions; and therefore, a motion for such second new trial should be made "upon written grounds filed at the time of making the motion." *Clayton v. School Dist.*, 20-256.

This section does not apply in action by one in possession of real property against another claiming an adverse interest therein, for the determination thereof. *Main v. Payne*, 17-610.

When after a judgment in an action of ejectment the defeated party files his motion for a new trial, under § 306, which was properly overruled, it is too late for him to make his demand for the first time in the supreme court, under § 599, for a second trial. *Anderson v. Kent*, 14-208.

Action for specific performance, and to quiet title; party not entitled, as a matter of right, to second trial. *Blackford v. Loveridge*, 10-102.

(*Code 1859, § 574.*) Right to second trial as a matter of course does not apply to suit to quiet title nor to an action for partition. *Swartzel v. Rogers*, 3-375.

(4417) **§ 600. No Further Trial.** No further trial can be had in such action, unless, for good cause shown, a new trial be granted, or the judgment be reversed, as in other actions.

Motions for a second new trial in actions of ejectment, are governed by the same rules which govern applications for new trials in other actions. *Clayton v. School Dist.*, 20-262.

ARTICLE 25—OCCUPYING CLAIMANTS.

SEC.

- 601. In what cases occupying claimants of land shall not be evicted until paid for improvements, etc.
- 602. Persons occupying under tax title shall not be evicted until paid for improvements.
- 603. Entry on journal, of claim for improvements; jury to be drawn.
- 604. Duty of jury.
- 605. Talesman may be summoned.
- 606. Return of jury; court may set aside and order new valuation.
- 607. Judgment and execution in favor of plaintiff; action for mesne profits barred.
- 608. Adverse claimant may tender deed, or pay the sum assessed against him by the jury.

SEC.

- 609. Writ of possession shall issue upon payment of sum reported in favor of occupying claimant.
- 610. If occupying claimant refuse to pay value of land without improvements, writ of possession may issue.
- 611. Occupying claimant not to be evicted, unless, etc.; occupant may obtain decree for title, when.
- 612. Plaintiff entitled to execution, when.
- 613. When land sold by executor, administrator, etc., is afterwards recovered by person originally liable, plaintiff not entitled to possession until purchase money refunded, etc.

(4418) **§ 601. Pay for Improvements.** In all cases any occupying claimant being in quiet possession of any lands or tenements for which such person can show a plain and connected title in law or equity, derived from the records of some public office, or being in quiet possession of and holding the same by deed, devise, descent, contract, bond, or agreement from and under any person claiming title as aforesaid derived from the records of some public office, or by deed duly authenticated and recorded, or being in quiet possession of and

holding the same under sale on execution or order of sale against any person claiming title as aforesaid, derived from the records of some public office, or by deed, duly authenticated and recorded; or being in possession of and holding any land under any sale for taxes authorized by the laws of this state, or the laws of the territory of Kansas; or any person or persons who have made a *bona fide* settlement and improvement which he, she or they still occupy upon any of the Indian lands lying in this state, or any lands held in trust for the benefit of any Indian tribe at the date of such settlement, or which may have heretofore been Indian lands, and which were vacant and unoccupied at the date of such settlement, and where the records of the county show no title or claim of any person or persons to said lands at the time of such settlement; or any person in quiet possession of any land claiming title thereto, and holding the same under a sale and conveyance made by executors, administrators, or guardians, or by any other person or persons in pursuance of any order of court or decree in chancery where lands are or have been directed to be sold and the purchasers thereof have obtained title to and possession of the same without any fraud or collusion on his, her or their part, shall not be evicted or thrown out of possession by any person or persons who shall set up and prove an adverse and better title to said lands until said occupying claimant, his, her or their heirs, shall be paid the full value of all lasting and valuable improvements made on said lands by such occupying claimant, or by the person or persons under whom he, she or they may hold the same previous to receiving actual notice by the commencement of suit on such adverse claim by which eviction may be effected. [L. 1873, ch 102, § 1 (§ 601, as amended); took effect March 20, 1873.]

The occupying-claimant law, as it now exists, was passed by the legislature in 1868, except that §§ 601 and 608 of such law were amended in 1873. *Held*, That said §§ 601 and 608 have the force and effect to so modify the other sections of the occupying-claimant law that the occupying claimant who has made lasting and valuable improvements on the land, and who is entitled to the benefit of the occupying-claimant law, will never forfeit his right to the improvements, or else to compensation therefor; and no writ of eviction can ever be issued against him to dispossess him, until he has been paid the full amount of the assessed value of his improvements; but said §§ 601 and 608 do not so modify or change the occupying-claimant law as to take away the right of the successful claimant, who has been adjudged to be the owner of the land, to elect to take the value of the land instead of the land itself; and under the occupying-claimant law, as it now exists, it is the duty of the court to permit such successful claimant and owner to

elect to take the value of the land, instead of the land itself, if the owner so chooses, and to fix some reasonable time within which the occupying claimant shall pay to the owner the value of the land as assessed by the jury. *Stephens v. Ballou*, 27-595.

Party holding land by bond, from any person claiming title by deed, duly authenticated and recorded, is entitled to benefits by this law. Where there is duly recorded a regular succession of conveyances, which appear upon their face in proper form and valid, from the original vendee of the government, but no title has actually passed, by reason of personal disability to convey in some grantor, the party in quiet possession, and claiming by such chain of title, is entitled, under the first clause of § 601, to the benefits of the act. While it may be doubted whether an Indian owner of land, held under treaty stipulation, can be compelled to pay for improvements, yet his grantee may. *Krause v. Means*, 12-335.

Reasonable notice must be given adverse party, or his attorney, in proceedings to value improvements; but this may be waived. *North v. Moore*, 8-143.

Where an occupying claimant held under a purchase at a sale under an order of sale, and also held under a certificate and deed of sale for taxes, and where plaintiffs below brought one action to set aside the sale under the order, another to set aside the tax deed and certificate, and a third to recover title, in all three of which actions they recovered, and where the defendants below claimed their improvements under said act for the relief of occupying claimants: *Held*, That the case as it stood in court was as though but one suit had been brought in the court below.

Being in possession of and holding land under any sale for taxes authorized by law, entitles the occupant to the benefit of this act, if his possession has been obtained without fraud or collusion, and this must be affirmatively shown to defeat the claim. Holding under a certificate of sale, without a tax deed, is sufficient.

The spirit of the law is, that the person receiving the benefits of improvements honestly made on lands shall make compensation; and this act should be liberally construed.

Where the claimant held under a certificate of sale for taxes in which the description was vague, but at the time of the commencement of the action held under a tax deed, with ample description, obtained after the improvements made, it was sufficient to entitle him to the provisions of the law. A claim of an occupying claimant for the value of his improvements, first introduced by supplemental answer, is made in time. *Stebbins v. Guthrie*, 4-353.

On March 6, 1873, the occupying-claimant act was so amended as to virtually repeal the proviso above quoted. In other respects, the occupying-claimant act, so far as it applies to this case, remains the same. The defendant claims the benefit of the occupying-claimant act as it now exists, claiming that the proviso above quoted has no application to his case. * * * In the contract itself it was stipulated in substance that time should be of the essence of the contract; that any failure in making payments

should render the contract utterly null and void; that by such failure the party holding under the contract should forfeit to the other party all improvements made on the premises and all right to compensation therefor; and that he should cease to have any interest therein. We do not think that a party holding under such a contract, and forfeiting his rights under it, by failing to perform its stipulations, can obtain relief under the occupying-claimant act. *Boeken v. Alderman*, 26-745.

It would not be in consonance with either justice or equity to allow a party who had procured an erroneous judgment, and had obtained the property thereunder, to retain the fruits of the judgment after it had been reversed by this court; but when a party has in good faith taken possession of land upon an erroneous judgment, under the circumstances of this case, and made lasting improvements thereon, such possession ought to be a sufficient justification for his recovery as an occupying claimant, because such improvements add to the value of the real estate. (22-671.) *Stephens v. Ballou*, 25-621.

No interest less than an apparent title would be sufficient, and this apparent title must be manifest from a consideration of the whole of the records of the public office to which the occupying claimant refers, so far as such records apply to the case. *C. B. U. P. R. R. v. Hardenbrook*, 21-440.

Pottawatomie Indian not compelled to pay for improvements under the occupying-claimant act. *Maynes v. Veale*, 20-389.

The act of March 6, 1873, amendatory to §§ 601 and 608, of ch. 80, Gen. Stat., is constitutional and valid, so far as providing that no writ or process for the eviction of a claimant entitled thereunder to the valuation of his lasting and valuable improvements, shall be issued until the assessment of the valuation of the improvements is paid. In substance, it only requires that the value of the improvements shall be paid, as a condition precedent to the entry and possession of the owner, and does not give the occupying claimant the option to keep the land. *Claypoole v. King*, 21-602.

Up to March 26, 1874, there was no law authorizing any person evicted from Indian lands, or from any other lands, to recover from the successful party the amount of the purchase-money which such unsuccessful party had paid. *Lemert v. Barnes*, 18-15.

Party in possession under tax deed of 1864; sale certificate of 1862 issued to a county, and assigned in 1864 to the holder of the tax deed by the county treasurer, who had no authority at that time to assign the same; though the tax deed is void on its face, yet the holder thereof is entitled to occupying-claimant act. *Smith v. Smith*, 15-291.

A quit-claim deed from a trespasser can by no ingenuity of construction be called "a plain and connected title, in law or equity." *Jay v. Granby Mining Co.*, 15-173.

(4419) § 602. **Under Tax Title.** The title by which the successful claimant succeeds against the occupying claimant, in all cases of lands sold for taxes, by virtue of any of the laws of this state or of the territory of Kansas, shall be con-

sidered an adverse and better title, under the provisions of this article, whether it be the title under which the taxes were due, and for which said land was sold, or any other title or claim whatever; and the occupying claimant holding possession of land sold for taxes, as aforesaid, having the deed of a collector of taxes or county clerk for such sale for taxes, or a certificate of sale of said land from a collector of taxes or a county treasurer, or shall claim under the person or persons who hold such deed or certificate, or any other title or claim whatever, shall be considered as having sufficient title to said land to demand the value of improvements under the provisions of this article.

Up to March 26, 1874, there was no law authorizing any person evicted from Indian lands, or from any other lands, to recover from the successful party the amount of the purchase-money which such unsuccessful party had paid. *Lemert v. Barnes*, 18-15.

Party in possession under tax deed of 1864; sale certificate of 1862 issued to a county, and assigned in 1864 to the holder of the tax deed by the county treasurer, who had no authority at that time to assign the same; though the tax deed is void on its face, yet the holder thereof is entitled to occupying-claimant act. *Smith v. Smith*, 15-291.

(4420) **§ 603. Claim for; Jury.** The court rendering judgment in any case provided for by this act [article], against the occupying claimant, shall, at the request of either party, cause a journal entry thereof to be made; and the sheriff and clerk of the court, when thereafter required by either party, shall meet and draw from the box a jury of twelve men, of the jurymen returned to serve as such for the proper county, in the same manner as the sheriff and county clerk are required by law to draw a jury in other cases; and immediately thereupon, the clerk shall issue an order to the sheriff, under the seal of the court, setting forth the name of the jury, and the duty to be performed under this article.

The law certainly does not contemplate that any party litigating the question of ownership to land shall set forth in his pleadings that he expects to claim the benefit of the occupying-claimant act, and thereby confess the hopelessness of his cause. It is only when a party is defeated, when his antagonist has set up and proved an adverse and better title, that he should make his application; and even then no formal or written application is required. Section 603 of the code provides how the occupying claimant shall make his application. *Lemert v. Barnes*, 18-13.

Where a party in an action of ejectment elects, after the verdict is rendered, to institute proceedings under the occupying-claimant law, and demands a jury for that purpose, he is estopped from instituting proceedings in error to reverse the judgment rendered in such action; and this, although the judgment had not yet been rendered when the election and demand were made. *Bradley v. Rogers*, 33-120.

(4421) **§ 604. Duty of Jury.** The jury drawn and named in said order shall immediately, on being notified by the sheriff, proceed to view the premises in question, and then and there, on oath or affirmation, to be administered by any competent authority, assess the value of all lasting and valuable improvements made, as aforesaid, on the lands in question, previous to the party receiving actual notice, as aforesaid, of such adverse claim; and shall also assess the damages, if any, which said land may have sustained by waste, together with the net annual value of the rents and profits which the occupying claimant may have received from the same, after having received notice of the plaintiff's title, by service of a summons, and deduct the amount thereof from the estimated value of such lasting and valuable improvements; and said jury shall also assess the value of the land in question, at the time of rendering judgment as aforesaid, without the improvements made thereon, or damages sustained by waste, as aforesaid.

(4422) **§ 605. Talesmen.** In case any one or more of the jury named in said order shall be absent from the county, of kin to either party, or, from any other cause, disqualified or unable to serve upon such jury, the sheriff shall have power to summon talesmen, as in other cases, who shall be qualified and serve on such jury in the same manner as if originally drawn and named in said order.

(4423) **§ 606. Return; New Valuation.** The jury shall sign and seal their respective assessments and valuations aforesaid, and deposit the same with the clerk of the court by whom they were appointed, before the first day of the next term of said court after said order is made; and if either party shall think himself or herself aggrieved by any such assessment or valuation aforesaid, he or she may apply to the court, at the term to which the proceedings are returned, and said court may, upon good cause shown, set aside such assessment or valuation, and order a new valuation, and appoint another jury, as hereinbefore provided, who shall proceed in the same manner as hereinbefore directed.

The return of a jury, under the occupying-claimant law, of the assessments and valuations made by such jury, is not subject to alterations or changes to be made by either of the parties, or by the jury, or by both together, after such return has been signed by the jury and deposited with the clerk of the district court. *Bradley v. Rogers*, 33-121.

(4424) **§ 607. Judgment and Execution.** If the jurors shall report a sum in favor of the plaintiff or plaintiffs in said action, for the recovery of real property on the assessment and

valuation of the valuable and lasting improvements, and the assessment of damages for waste, and the net annual value of the rents and profits, the court shall render a judgment therefor without pleadings, and issue execution thereon as in other cases; or if no excess be reported in favor of said plaintiff or plaintiffs, then, and in either case, the said plaintiff or plaintiffs shall be thereby barred from having or maintaining any action for mesne profits.

(4425) **§ 608. Judgment for Claimant.** That if the jurors impaneled under the provisions of such act shall report a sum under the provisions of the same in favor of the occupying claimant or claimants, or the assessment of the valuation of the valuable and lasting improvements, deducting the damages to said land, as is provided in said act, the court shall render judgment in favor of the said occupying claimant or claimants for the sum or sums so assessed by the said jurors as aforesaid, and no writ or process for the eviction of the said claimant or claimants shall be issued until the said judgment shall be paid. [L. 1873, ch. 102, § 2 (§ 608, as amended); took effect March 20, 1873.]

An Indian, owner of land held under treaty stipulations, which provide that the land shall be exempt from levy, taxation or sale, and shall be alienable in fee, or leased or otherwise disposed of, only to the United States, or to persons then being members of the Pottawatomie tribe and of Indian blood, with the permission of the president, and under such regulations as the secretary of the interior shall direct, cannot be compelled to pay for improvements on the premises under the occupying-claimant act. *Maynes v. Veale*, 20-374.

(4426) **§ 609. Writ of Possession.** If the successful claimant, his heirs, or the guardian of such heirs, they being minors, shall elect to pay, and do pay to, the occupying claimant, the sum so reported in his favor by the jurors, within such reasonable time as the court may have allowed for the payment thereof, then a writ of possession shall issue in favor of said successful claimant, his heirs, or the guardians of such heirs.

(4427) **§ 610. If Claimant Refuse to Pay.** If the successful claimant, his heirs, or the guardians of said heirs, they being minors, shall elect to receive the value without improvements so as aforesaid assessed, to be paid by the occupying claimant within such reasonable time as the court may allow, and shall tender a general warranty deed of the land in question, conveying such adverse or better title within said time allowed by the court for the payment of the money in this sec

tion mentioned, and the occupying claimant shall refuse or neglect to pay said money (the value of the land without the improvements) to the successful claimant, his heirs or their guardians, within the time limited as aforesaid, then a writ of possession shall be issued in favor of said successful claimant, his heirs or their guardians.

(4428) **§ 611. Not Evicted, Unless, etc.; Decree.** The occupying claimant or his heirs shall in no case be evicted from the possession of such land, unless, as is provided in the two preceding sections, where an application is made for the value of improvements under this law; and in all cases, where the occupying claimant or claimants, or his or their heirs, shall have paid into court the value of the lands in question, without improvements, within the time allowed by the court (when an election has been made by the successful claimant or claimants, his or their heirs or guardians as aforesaid, to surrender any tract of land under the provisions of this act), such occupant or his heirs may, at any time after such payment shall have been made, file his, her or their petition in the court where such judgment of eviction was obtained, and obtain a decree for the title of such land, if the same has not been previously conveyed to such occupant as aforesaid.

(4429) **§ 612. Execution, etc.** The plaintiff shall be entitled to an execution for the possession of his property, in accordance with the provisions of this article, but not otherwise.

(4430) **§ 613. Land Sold by Executor, etc.** Whenever any land, sold by an executor, administrator, guardian, sheriff or commissioner of court, is afterwards recovered in the proper action by any person originally liable, or in whose hands the land would be liable to pay the demand or judgment for which, or for whose benefit the land was sold, or any one claiming under such person, the plaintiff shall not be entitled to the possession of the land until he has refunded the purchase-money, with interest, deducting therefrom the value of the use, rents and profits, and injury done by waste and cultivation, to be assessed under the provisions of this article.

This section and § 136, ch. 107, Gen. Stat., may operate retrospectively without impairing contracts or disturbing vested rights, or assuming judicial power, as they simply provide for the reinstatement and payment of certain valid liens on real estate, by the persons who paid them in good faith, and who are equitably entitled to have the money refunded. *Claypoole v. King*, 21-602.

ARTICLE 26—PARTITION.

SEC.	SEC.
614. Petition.	624. Judgment shall be rendered, when.
615. Facts to be set forth.	625. If partition cannot be made, party may take property at the appraisalment.
616. Who may be made parties.	626. Property shall be sold, in what case.
617. Answer must state what.	627. Return of sheriff; he shall execute a deed, when.
618. Order of court.	628. Costs and fees, how paid.
619. Commissioners to be appointed to make partition.	629. Power of court to make orders.
620. Court may direct allotments.	
621. Oath of commissioners.	
622. Partition, how made; commissioners to make report.	
623. Report may be set aside, when.	

(4431) **§ 614. Petition.** When the object of the action is to effect a partition of real property, the petition must describe the property and the respective interests of the owners thereof, if known.

Whether a party having the legal title to an undivided portion of a tract of land, but actually disseized by the party holding the title to the remaining interest, must recover possession before he can proceed under the statute of 1868 for partition, is a question suggested but not decided. *Squires v. Clark*, 17-84.

(4432) **§ 615. Unknown Shares or Owners.** If the number of shares or interests is known, but the owners thereof are unknown, or if there are, or are supposed to be, any interests which are unknown, contingent or doubtful, these facts must be set forth in the petition with reasonable certainty.

(4433) **§ 616. Parties.** Creditors having a specific or general lien upon all or any portion of the property, may be made parties.

Action for ejectment, rents and profits and partition may be united. *Scarborough v. Smith*, 18-405.

(4434) **§ 617. Answer.** The answers of the defendants must state, among other things, the amount and nature of their respective interests. They may also deny the interests of any of the plaintiffs, or any of the defendants.

(4435) **§ 618. Order; Partition.** After the interests of all the parties shall have been ascertained, the court shall make an order specifying the interests of the respective parties, and directing partition to be made accordingly.

(4436) **§ 619. Commissioners.** Upon making such order, the court shall appoint three commissioners to make partition into the requisite number of shares.

(4437) **§ 620. Allotments.** For good and sufficient rea-

sons appearing to the court, the commissioners may be directed to allot particular portions to any one of the parties.

(4438) § **621. Oath.** Before entering upon their duties, such commissioners shall take and subscribe an oath that they will perform their duties faithfully and impartially, to the best of their ability.

(4439) § **622. Report.** The commissioners shall make partition of the property among the parties according to their respective interests, if such partition can be made without manifest injury. But if such partition cannot be made, the commissioners shall make a valuation and appraisement of the property. They shall make a report of their proceedings to the court, forthwith.

(4440) § **623. Setting Aside Report.** Any party may file exceptions to the report of the commissioners, and the court may, for good cause, set aside such report, and appoint other commissioners, or refer the matter back to the same commissioners.

(4441) § **624. Judgment.** If partition be made by the commissioners, and no exceptions are filed to their report, the court shall render judgment that such partition be and remain firm and effectual forever.

(4442) § **625. When Partition Cannot be Made.** If partition cannot be made, and the property shall have been valued and appraised, any one or more of the parties may elect to take the same at the appraisement, and the court may direct the sheriff to make a deed to the party or parties so electing, on payment to the other parties of their proportion of the appraised value.

(4443) § **626. Property Sold.** If none of the parties elect to take the property at the valuation, or if several of the parties elect to take the same at the valuation, in opposition to each other, the court shall make an order directing the sheriff of the county to sell the same, in the same manner as in sales of real estate on execution; but no sale shall be made at less than two-thirds of the valuation placed upon the property by the commissioners.

(4444) § **627. Return of Sheriff; Deed.** The sheriff shall make return of his proceedings to the court, and if the sale made by him shall be approved by the court, the sheriff shall execute a deed to the purchaser, upon the payment of the purchase-money, or securing the same to be paid, in such manner as the court shall direct.

(4445) § **628. Costs and Fees.** The court making partition shall tax the costs, attorneys' fees and expenses which may accrue in the action, and apportion the same among the parties, according to their respective interests, and may award execution therefor, as in other cases.

(4446) § **629. Power of Court.** The court shall have full power to make any order, not inconsistent with the provisions of this article, that may be necessary to make a just and equitable partition between the parties, and to secure their respective interests.

Where one tenant-in-common lays out money in improvements on the estate, and thereby enhances its value, although the money so paid does not in strictness constitute a lien on the estate, a court of equity will not grant a partition without first directing an account and a suitable compensation. *Sarbach v. Newell*, 30-103.

The improvements in this case seem to have been made in good faith, the defendants supposing themselves to be legally entitled to the whole premises, and the court did not err under the provisions of said section and the principles of equity in making the decree complained of. *Sarbach v. Newell*, 28-647.

Action for ejectment, rents and profits and partition may be united. *Scarborough v. Smith*, 18-405.

ARTICLE 27—LIENS OF MECHANICS AND OTHERS.

SEC.

- 630. Lien for labor and materials.
- 631. Sub-contract; statement to be filed; liability of owner; payment by owner.
- 632. Verified statement to be filed.
- 633. Lien may be enforced by civil action.
- 634. Who made parties, etc.; defense.

SEC.

- 635. Actions consolidated.
- 636. Sale of real estate shall be ordered, when.
- 637. Payments, how made when proceeds insufficient.
- 638. Repealed.
- 638a. Certain sections repealed.

(4447) § **630. Liens for Labor and Material.** Any mechanic or other person who shall, under contract with the owner of any tract or piece of land, his agent or trustee, or under contract with the husband or wife of such owner, perform labor or furnish material for erecting, altering or repairing any building or the appurtenances of any building, or any erection or improvement, or shall furnish or perform labor in putting up any fixtures or machinery in or attachment to any such building or improvement, or plant and grow any trees, vines and plants or hedge or hedge fence, or shall build a stone

fence, or shall perform labor or furnish material for erecting, altering or repairing any fence on any tract or piece of land, shall have a lien upon the whole piece or tract of land, the buildings and appurtenances, in the manner herein provided, for the amount due to him for such labor or material, fixtures or machinery. Such liens shall be preferred to all other liens and incumbrances which may attach to or upon such lands, buildings or improvements or either of them, subsequent to the commencement of such building, the furnishing or putting up of such fixtures or machinery, or planting and growing of such trees, vines or plants, or hedge or hedge fence or stone fence, or the making of any such repairs or improvements; and if any promissory note, bearing not exceeding twelve per cent. interest per annum, shall have been taken for any such labor or material, it shall be sufficient to file a copy of such note, with a sworn statement, that said note or any part thereof, was given for such labor or material used in the construction of any such building or improvement, in the office of the district clerk, and it shall be necessary to file a list of items used, and the lien shall be for the principal and interest aforesaid, as specified in said note. [L. 1872, ch. 141, §1; took effect March 14, 1872.]

Mechanic's lien not allowed on house built on land the title of which is still in the government, and party not entitled to patent. If the defendant had been entitled to a patent, we think the lien would have attached to the land. *Kansas Lumber Co. v. Jones*, 32-197.

A mechanic's lien may attach to leasehold estate. *Hathaway v. Davis*, 32-697.

The law of 1870, ch. 87, § 22, was repealed in 1871, and now the word "owner" includes an owner of a leasehold. *Hathaway v. Davis*, 32-697.

Where a person has a contract with the owner of a piece of land, erecting an opera house thereon, to do all the stone work and furnish the materials for said work, and sublets to another the furnishing of the materials, and neither of said persons has the contract to complete the building, the sub-contractor, for the purpose of filing his lien for the materials furnished by him, and bringing his action to foreclose the lien, may regard the improvement or building as completed when the contractor and such sub-contractor have fulfilled and completed their contracts. *Crawford v. Blackman*, 30-528.

Intermediate between the time of the construction of the cellar and the sale of the lumber, another person obtains a mortgage on the property. *Held*, Under the statutes of Kansas, (Comp. Laws 1879, § 630,) that the mechanic's lien is prior to the mortgage lien; that the commencement of the building, within the meaning of the statute, was at the time of the commencement of the excavation for the cellar. *Thomas v. Mowers*, 27-265.

It perhaps may not be necessary to file two separate statements; but if only one is filed it must contain all prescribed by § 3, and must be filed within the time named in § 2. *Newman v. Brown*, 27-120.

One who would create and enforce a mechanic's lien upon a building, must proceed according to the statute; and if, after taking the proper steps for filing his lien, he commences action thereon before or after the times authorized by statute, no decree foreclosing the lien will be awarded.

An action foreclosing a mechanic's lien will not lie until sixty days after the completion of the building or improvement, and that notwithstanding earlier payment was stipulated for, and though action might be maintained for the money promised, immediately upon failure of payment at the time agreed upon.

Where, pending the erection of a building, the owner ceases work and loses title, and the party acquiring the title proceeds with the work as regularly as the prior owner, and completes the building commenced by such owner, a contractor under such owner cannot elect to consider the building completed at the time of the transfer of title, and file and foreclose his lien accordingly. *Perry v. Conroy*, 22-716.

A sub-contractor who furnishes labor and material for the erection of a building has, under the Laws of 1872, sixty days from and after the completion of such building within which to file a mechanic's lien, to secure his pay; and he is not bound to file his lien in such a case within sixty days from and after the time when he furnished such labor and material.

A sub-contractor who furnishes labor and material for the erection of a building, and who afterward files a mechanic's lien thereon to secure his pay, is not bound, under said law of 1872, by any of the terms and conditions relating to the payment of money, contained in the original contract made between the owner and contractor, except by such of said terms and conditions as prescribe the amount that is to be paid. When a contract is made for the erection of a building, the contract price for the erection thereof constitutes a fund from which the sub-contractors are to be paid for their labor and materials furnished; and if such fund is not sufficient to pay the whole amount of all the claims of the sub-contractors who are entitled to liens under said law of 1872, then such claims must be paid from such fund *pro rata*. *Clough v. McDonald*, 18-114.

Mechanic's lien may be had in the erection of school house by a school district. *Wilson v. School Dist.*, 17-104; *School Dist. v. Conrad*, 17-522.

A petition setting up that third party has an unknown interest, and that the same may be barred, does not entitle a decree barring the rights of that person. Agent may verify statement. Lumberman furnishing lumber under a contract, and for the purpose of being used in such building, may have lien. (10-80 explained.) The lien of the sub-contractor is limited only by the amount contracted to be paid to the contractor; and all payments made to the contractor prior to the expiration of sixty days after the completion of the building, are at the risk of the owner. *Delahay v. Gol-die*, 17-263.

The lien of the sub-contractor is limited only by the amount contracted

to be paid the contractor. All payments prior to expiration of sixty days after the completion of the building, are at the risk of the owner, and cannot be taken in reduction of the lien of the sub-contractor. *Shellabarger v. Thayer*, 15-619.

A party furnishing material for the erection of a building, had four months from the completion of the building in which to file his statement for a lien (under law of 1872). *Shellabarger v. Bishop*, 14-432.

It is not necessary for the holder of the promissory note to commence an action to enforce the lien, until after the note becomes due. *Board v. Scoville*, 13-28.

Owner of building has a cause of action for interpleader against the various claimants of the building fund in this case. *Board v. Scoville*, 13-18.

Where the owner of property makes a contract with a builder to erect a building and to furnish all the lumber therefor, and such contractor purchases the lumber himself, but fails to pay for the same, the contractor is alone responsible, and no lien attaches to building and land in favor of the creditor. In such case, if the owner were to promise to pay for such lumber, his promise would be a promise to pay the debt of another, and if not in writing would be void. (1872.) *Clark v. Hall*, 10-81.

Where a vendor sells lumber on credit, without any reference to what shall be done with it, and the vendee afterwards uses the lumber in constructing a building on land belonging to himself, the vendor has no lien on the said land and building for the purchase-money which will be prior to the lien of a subsequent mortgagee, nor in fact has he any lien. In order for a vendor to obtain a lien in such a case, he should sell and furnish the lumber with the intention and understanding that it should be used in constructing the building. Vested rights. Whenever a mechanic's lien is created for material furnished, the right to the lien becomes a vested right at the time the material is so furnished, and it is not within the power of the legislature to afterwards destroy such right by repealing the statute under which the right has accrued, or otherwise. *Weaver v. Sells*, 10-609.

A mechanic's lien dates from the time of making the contract. *Mitchell v. Penfield*, 8-186.

A personal judgment may be rendered against the defendant debtor in a suit under ch. 137, C. L. 1862, to enforce a mechanic's lien, even though the plaintiff in such suit may have failed to establish his lien. *Haight v. Schuck*, 6-192.

Where a husband died in 1856, seized of lots in question, it was held that the law of 1855, p. 314, giving the widow a right to a life estate in one-third of the deceased husband's realty, gave her a personal, unassignable right to claim that dower, but which she could relinquish to the owner of the fee. Until she asserted her right thereto, and it was assigned to her, she did not become the "owner" thereof, within the meaning of the act securing liens to mechanics, and nothing would pass by a sale of her interest. *Ermel v. Kullok*, 3-499.

(4448) § 631. Statement; Sub-Contract; Liability of

Owner. Any person who shall furnish any such material or perform such labor under a sub-contract with the contractor, wishing to avail himself of the act, shall file a statement of the amount due him from such contractor, for the labor performed or the material, fixtures or machinery furnished, and a description of the property upon [to] which the same were done [applied] within sixty days after the completion of the buildings, improvements or repairs or the furnishing or putting up of fixtures or machinery, or the performing of such labor, in a book kept by the clerk of the district court for that purpose, and furnish a copy thereof to the owner or agent of the premises, which book shall be ruled off into separate columns with heads as follows: When filed, name of contractor, name of claimant, amount claimed and description of property, and the proper entry shall be made under each of such heads, and the district clerk shall be entitled to a fee of twenty-five cents for making such entries; and if the contractor does not pay such person or sub-contractor for the same, such sub-contractor or person shall have a lien for the amount due, for such labor or material, on such lot or lots from the same time, and to the same extent, and in the same manner, and to the same extent as such original contractor: *Provided*, That the owner shall not be liable to such sub-contractor for any greater amount than he contracted to pay the original contractor, but the risk of all payments made to the original contractor shall be upon the owner until the expiration of the sixty days hereinbefore specified; and no owner shall be liable to an action by the contractor until the expiration of said sixty days, and such owner may pay such sub-contractor or person the amount due him from such contractor for such labor and material, and the amount so paid shall be held and deemed a payment of said amount to the principal contractor. [L. 1872, ch. 141, § 2; took effect March 14, 1872.]

The difference between the statement required by § 3 and that required by § 2 is, that the former must include the name of the owner, must be verified by affidavit, and need not be filed until four months from the completion of the building; while the latter need not give the name of the owner, is not required to be verified, and must be filed within sixty days. Now the contention is, that as by § 2 a sub-contractor is compelled to file one statement within sixty days, § 3 can have no reference to a sub-contractor's lien, but must refer to the lien authorized by § 1 to a contractor, for it is said there can be no necessity in requiring the filing of two statements, and that therefore the legislature cannot have intended that they should be so filed. We are constrained to differ with these views, and to hold that § 3 is applicable to both lien of the contractor and sub-contractor, as authorized

by the two preceding sections. * * * It perhaps may not be necessary to file two separate statements; but if only one is filed, it must contain all prescribed by § 3, and must be filed within the time named in § 2. *Newman v. Brown*, 27-120.

While it is undoubtedly true, that in order to sustain a mechanic's lien for materials, it must appear, not only that the materials were purchased to be used in the building, but also that they were in fact so used; yet when it is satisfactorily shown that the materials were sold to be used in such building, that they were delivered to the builder, and that the building was actually built, and when there is testimony showing that some of the materials were actually used in the construction of the building, and there is nothing even raising a suspicion that the materials, after having been delivered for the purpose, were used elsewhere by the builder, or that an unnecessary amount of material was purchased for such a building: *Held*, That a finding of the trial court sustaining the lien will not be disturbed, although it was not affirmatively and specifically shown as to each article that it went into the building. *Rice v. Hodge*, 26-164.

T. made a contract with P. to plant, grow, cultivate and train a hedge on a quarter-section of land belonging to P., and commenced the work. The contract stipulated for a partial payment when the work was partly done. Thereafter P. conveyed the land to S., who purchased with knowledge of the contract. T., filing lien papers, commenced an action against S. to foreclose a mechanic's lien. The jury rendered a general verdict for the defendant, and in addition, found in answer to a particular question, that T. had not yet completed his contract. *Held*, That as no action to foreclose a mechanic's lien will lie until sixty days after the completion of the improvement, and as S. was not personally liable on the contract, the judgment for defendant must be affirmed, and that irrespective of any question of error in other matters. *Treat v. Sutliff*, 24-35.

Where, pending the erection of a building, the owner ceases work and loses title, and the party acquiring title proceeds with the work as regularly as the prior owner, and completes the building commenced by such owner, a contractor under such owner cannot elect to consider the building completed at the time of the transfer of title, and file and foreclose his lien accordingly. *Perry v. Conroy*, 22-716.

The lien of the sub-contractor is limited only by the amount contracted to be paid the contractor. All payments prior to expiration of sixty days after the completion of the building are at the risk of the owner, and cannot be taken in reduction of the lien of the sub-contractor. *Shellabarger v. Thayer*, 15-619.

✓ (4449) § 632. **File Statement; Duty of Clerk.** Any person claiming a lien as aforesaid, shall file in the office of the clerk of the district court of the county in which the land is situated, a statement setting forth the amount claimed and the items thereof as nearly as practicable, the name of the owner, the name of the contractor, the name of the claimant, and a

description of the property subject to the lien verified by affidavit. Such statement shall be filed within four months after the completion of the building, improvements or repairs, or the furnishing or putting up of fixtures or machinery, or the planting of such hedge or the building of such fence, or the furnishing of such material or labor for the building of such fence. The clerk of the district court shall immediately upon the receipt of such statement, enter a minute of the same in a book kept for that purpose, to be called the mechanics' lien book. Such docket shall be ruled off into separate columns with heads as follows: When filed, name of owner, name of contractor, name of claimant, amount claimed, description of property and remarks; and the proper entry shall be made under each of such heads. The costs of filing and entering such statement shall be recovered as part of the costs of enforcing the lien. [L. 1872, ch. 141, § 3; took effect March 14, 1872.]

As between the owner of the property and the contractor and sub-contractor, the contractor and the sub-contractor should be considered as substantially one and the same person with reference to the completion of the building, and therefore that the building should be considered as completed when, and only when, the contractor has completed his part thereof. The statement for the lien must be filed within four months *after* the completion, and not *before* the completion of the building. *Davis v. Bullard*, 32-236.

If the contractor should abandon the work for any cause before completing the building, under his contract it is possible, and even probable, that the sub-contractor may then, if not inequitable, obtain liens thereon within four months thereafter. *Davis v. Bullard*, 32-236.

A statement filed by sub-contractor, and before the completion of the building, is prematurely filed, and creates no lien. *Seaton v. Chamberlain*, 32-239.

Where a person has a contract with the owner of a piece of land, erecting an opera house thereon, to do all the stone work and furnish the materials for said work, and sublets to another the furnishing of the materials, and neither of said persons has the contract to complete the building, the sub-contractor, for the purpose of filing his lien for the materials furnished by him, and bringing his action to foreclose the lien, may regard the improvement or building as completed when the contractor and such sub-contractor have fulfilled and completed their contracts. *Crawford v. Blackman*, 30-528.

A statement for a mechanic's lien filed four months before the completion of the building or improvement, is not filed within the time prescribed by statute, and is not sufficient to create a lien. *Conroy v. Perry*, 26-472.

A party furnishing materials for the erection of a building, had four months from the completion of the building in which to file his statement for a lien (under law of 1872.) *Shellabarger v. Bishop*, 14-432.

An affidavit made by an agent of another, certifying a statement of a claim filed with the clerk of the district court, under § 3 of the mechanic's lien law of 1871, for the purpose of procuring a mechanic's lien on certain real estate, should be sworn to positively. An affidavit for such purpose, made by such an agent, stating that "the facts as above set forth are true and correct according to the best of his (the agent's) knowledge and belief," without showing that he had any knowledge upon the subject, is not sufficient. When an affidavit made in such case is defective, it can be amended only by attaching a sufficient affidavit to the statement, within the time allowed by law for filing the statement with the clerk. *Dorman v. Crozier*, 14-224.

Where a vendor sells lumber on credit, without any reference to what shall be done with it, and the vendee afterwards uses the lumber in constructing a building on land belonging to himself, the vendor has no lien. *Weaver v. Sells*, 10-609.

An order of attachment may be issued on proper affidavit, in an action "for the recovery of money," due on an account, and to foreclose a mechanic's lien for the amount so claimed to be due. *Gillespie v. Lovell*, 7-419.

(4450) **§ 633. Enforced by Action; Limitation.** Such lien may be enforced by civil action in the district court of the county in which the land is situated, which action shall be brought within one year from the time any new building, erection or improvement is completed, or in case of repairs made, or fixtures or machinery put up or furnished for any building or improvement, and completed within one year from the time such repairs are completed, or the fixtures or machinery put up or furnished; and in case a promissory note is given, no lien shall be enforced thereon unless action be commenced within one year from the maturity of the said note. The practice, pleadings and proceedings in such action shall be in conformity with the rules prescribed by the code of civil procedure as far as the same are applicable. [L. 1872, ch. 141, § 4; took effect March 14, 1872.]

It is not necessary for the holder of the promissory note to commence an action to enforce the lien until after the note became due. *Board v. Scoville*, 13-28.

Where the written statement is to the effect that the contract was made on or about the 30th day of June, 1869, the mechanic's lien claimant may show that the contract was made about 22d day of June, where no one has been misled. *Mitchell v. Penfield*, 8-186.

An attachment may be had in an action to enforce a mechanic's lien. *Gillespie v. Lovell*, 7-419.

(4451) **§ 634. Parties; Defense, etc.** In such action all persons whose liens are filed as herein provided, and other incumbrancers, shall be made parties, and issues shall be made and trials had as in other cases. Where such action is brought by a sub-contractor, or other person not the original contractor, such original contractor shall be made a party defendant, and shall, at his own expense, defend against the claim of every sub-contractor, or other person claiming a lien under this act; and if he fails to make such defense, the owner may make the same at the expense of such contractor; and until all such claims, costs and expenses are finally adjudicated, and defeated or satisfied, the owner shall be entitled to retain from the contractor the amount thereof, and such costs and expenses as he may be required to pay. [L. 1871, ch. 97, § 1; took effect March 23, 1871.]

The owner of a building owes the contractor for erecting the same a certain sum of money, (the amount thereof not being disputed.) Various other persons claim to have liens upon the fund which the owner of said building owes to the contractor, as follows: Certain persons claim as sub-contractors, and that they have mechanics' liens on said building to secure their respective claims; others claim that they are creditors of the contractor, and have garnishment liens on said fund, by virtue of attachment proceedings in a justice's court; others claim that they are judgment-creditors of the contractor, and have garnishment liens on said fund by virtue of proceedings in aid of execution before a judge *pro tem.* of the district court. Each of these various persons assert that his own claim is prior and paramount to that of any other person; and in the aggregate these claims amount to vastly more than the amount which the owner of the building owes to the contractor, and the owner of the building cannot well pay any of said claims without great hazard to himself, and several of said claimants are proceeding and about to proceed against the owner of the building to collect in separate actions their respective claims. *Held*, In such a case, that the owner of the building has a cause of action for interpleader against the various claimants of said fund. *Board v. Scoville*, 13-17.

If the contractor should abandon the work for any cause before completing the building under his contract, it is possible, and even probable, that the sub-contractor may then, if not inequitable, obtain liens thereon within four months thereafter. *Davis v. Bullard*, 32-236.

A statement filed by sub-contractor, and before the completion of the building, is prematurely filed, and creates no lien. *Seaton v. Chamberlain*, 32-239.

(4452) **§ 635. Consolidation.** If several actions, brought to enforce the liens herein provided for, are pending at the same

time, the court may order them to be consolidated. [L. 1871, ch. 97, § 6; took effect March 23, 1871.]

(4453) § **636. Sale.** In all cases where judgments have been or may hereafter be rendered in favor of any person or persons, to enforce a lien under the provisions of this act, the real estate or other property shall be ordered to be sold as in other cases of sales of real estate, such sale to be without prejudice to the rights of any prior encumbrancer, owner, or other person not parties to the action. [L. 1871, ch. 97, § 7; took effect March 23, 1871.]

(4454) § **637. Payments.** If the proceeds of the sale be insufficient to pay all the claimants, then the court shall order them to be paid in proportion to the amount due each. [L. 1871, ch. 97, § 8; took effect March 23, 1871.]

(4455) § **638. Repeal.** Repealed, L. 1871, ch. 97, § 10; this chapter, § 638*a*. Section nine of the said act of 1871 was repealed by L. 1872, ch. 141, § 5.

(4456) § **638*7*. Repeal.** Sections 630 to 638 inclusive (being article 27), of the code of civil procedure [known as] chapter 80 of the general statutes of 1868, and sections 21, 22, 23, 24, 25 and 26 of chapter 87 of the laws of 1870, are hereby repealed. [L. 1871, ch. 97, § 10; took effect March 23, 1871.]

ARTICLE 28—DIVORCE AND ALIMONY.

SEC.

- 639. Causes for granting divorce.
- 640. Plaintiff to be resident, how long.
- 641. Petition to be verified; issue and service of summons.
- 642. Answer of defendant.
- 643. When court may refuse divorce; may make what order.
- 644. Attachment to re-train disposition of property; expenses of suit.
- 645. Upon granting divorce, court shall make provision for custody and support of minor children.
- 646. Court may adjudge alimony to the wife, when; how paid; property rights.

SEC.

- 647. Divorce, a dissolution of the marriage contract; claim to property barred.
- 648. Marriage void, for incapacity of parties.
- 649. Alimony may be obtained without divorce; defense of husband.
- 650. What shall be admitted in evidence; no divorce to be granted without proof.
- 651. Wife shall be deemed resident of this state, when.
- 651*a*. Parties may testify.

(4457) § **639. Causes for Divorce.** The district court may grant a divorce for any of the following causes: *First*, When either of the parties had a former husband or wife living at the time of the subsequent marriage. *Second*, Abandonment for

one year. *Third*, Adultery. *Fourth*, Impotency. *Fifth*, When the wife, at the time of the marriage, was pregnant by another than her husband. *Sixth*, Extreme cruelty. *Seventh*, Fraudulent contract. *Eighth*, Habitual drunkenness. *Ninth*, Gross neglect of duty. *Tenth*, The conviction of a felony, and imprisonment in the penitentiary therefor, subsequent to the marriage.

There are manifest and manifold reasons, which will naturally occur to any one upon consideration, why the service in a divorce proceeding, founded upon the conviction and imprisonment of the defendant, ought to be excepted from the general rule forbidding the service of process upon a defendant in prison. *Comm'rs v. Laurence*, 29-162.

A judgment rendered in Utah for divorce, when neither had been in the territory, and no notice had been given to the wife, is void. *Litowich v. Litowich*, 19-451.

Residence forms no part of any of the causes for which a divorce may be granted, nor is it mentioned in the statute among such causes. *Litowich v. Litowich*, 19-456.

In many cases she may sue him directly for support. *Jenness v. Cutler*, 12-517.

The supreme court has jurisdiction of cases for divorce, when brought up on error. *Ulrich v. Ulrich*, 8-402.

(4458) § 640. **Residence.** The plaintiff in an action for divorce must have been an actual resident, in good faith, of the state, for one year next preceding the filing of the petition, and a resident of the county in which the action is brought at the time the petition is filed.

The words "resident," and "actual resident," as used in the divorce statutes, we think contemplate a residence and actual residence, with substantially the same attributes as are intended when the word "domicile" is used; and we do not think that it makes any difference that the word "residence" sometimes or in some other statute may mean something else. *Carpenter v. Carpenter*, 30-717.

A wife may commence and maintain an action in Kansas for alimony, without having been a resident of the state for the whole of the year next preceding the commencement of such action. *Litowich v. Litowich*, 19-451.

(4459) § 641. **Petition; Summons.** The petition must be verified as true, by the affidavit of the plaintiff. A summons may issue thereon, and shall be served, or publication made, as in other cases. When service by publication is proper, a copy of the petition, with a copy of the publication notice attached thereto, shall, within three days after the first publication is made, be enclosed in an envelope addressed to the defendant, at his or her place of residence, postage paid, and

deposited in the nearest postoffice, unless the plaintiff shall make and file an affidavit that such residence is unknown to the plaintiff, and cannot be ascertained by any means within the control of the plaintiff.

The petition must be verified as true by the affidavit of the plaintiff; an agent, or attorney, or guardian is not mentioned. *Birdzell v. Birdzell*, 33-436.

The mailing of the copy of the petition and notice, as required by said § 641, is a part of the service; and therefore, in a case where such mailing has been duly made, in addition to the publication of notice in the paper, § 77 does not apply, and a decree legally entered under those circumstances cannot be set aside under the mere showing of actual ignorance of the pendency of the suit. *Lewis v. Lewis*, 15-193.

Where a decree of divorce was duly and legally entered, after service by publication, and the mailing of a copy of the petition and publication notice, as required by § 641 of the code: *Held*, That the defendant could not come in under § 77 of the code, and upon the showing of want of actual notice, have the decree set aside and be let in to defend. *Lewis v. Lewis*, 15-193.

Where the decree of divorce contained no other order concerning property than one barring defendant of all right and interest in the property of plaintiff: *Held*, That this order must stand with the decree, and the decree being undisturbed, the order could not be set aside. *Lewis v. Lewis*, 15-193.

Verification of petition before the attorney of plaintiff is unauthorized. *Warner v. Warner*, 11-123.

(4460) § 642. **Answer.** The defendant, in his or her answer, may allege a cause for a divorce against the plaintiff, and may have the same relief thereupon as he or she would be entitled to for a like cause if he or she were plaintiff. When new matter is set up in the answer, it shall be verified as to such new matter by the affidavit of the defendant.

(4461) § 643. **Refuse Divorce; Custody Children.** When the parties appear to be in equal wrong, the court may, in its discretion, refuse to grant a divorce; but in any such case, or in any other case where a divorce is refused, the court may, for good cause shown, make such orders as may be proper for the custody, maintenance and education of the children, or the control and disposition of the property of the parties, as may be proper.

Where a wife commences an action against her husband for a divorce, and upon the trial it appears that the parties are in equal wrong, and the court refuses to grant a divorce, the court may, for good cause shown, make an order for the control and disposition of the property of the parties as may be proper; and in disposing of the property, may set apart to the wife

absolutely personal property, and also give her the rents and profits of real estate. *Busenbark v. Busenbark*, 33-572.

(4462) **§ 644. Restrain Disposition of Property.** After a petition has been filed in an action for a divorce, or for alimony alone, the court, or a judge thereof in vacation, may make and enforce, by attachment, such order to restrain the disposition of the property of either party, or for the control of the children and support of the wife, during the pendency of the action, as may be right and proper; and, also, may make such order, relative to the expenses of the suit, as will insure to the wife an efficient preparation of her case; and on granting a divorce in favor of the wife, or refusing one on the application of the husband, the court may require the husband to pay all reasonable expenses of the wife in the prosecution or defense of the action.

In an action for alimony, the court may restrain by injunction the disposition of the husband's property, pending the litigation. *Jenness v. Cutler*, 12-517.

On petition in error from an order granting an injunction on an application for alimony, in an action for divorce, the record showing that at the first hearing the "affidavit was quashed," and time given for amending it, and the record not containing either the affidavit or petition, had the supreme court jurisdiction, it would presume a sufficient showing to sustain the order.

Section 16, act February 27, 1860, (ch. 81, C. L. 1862, § 477,) precludes the exercise by the supreme court of any jurisdiction in divorce cases. *Worth v. Worth*, 4-223.

An order was granted, under § 644, code, restraining a party from disposing of his property during suit. No bond was filed. *Held*, That in such case a bond is not required. There is a marked difference made in the code between injunctions and restraining orders. (Code, §§ 240, 241. *In re Mitchell*, McC.-256.

(4463) **§ 645. Children.** When a divorce is granted, the court shall make provision for guardianship, custody, support and education of the minor children of the marriage, and may modify or change any order in this respect, whenever circumstances render such change proper.

Of course the defendant is under obligation, legal, moral and natural, to support his minor children; but he is under no obligation to pay money to his divorced wife for any such purpose. He was under legal obligation, by force of said judgment, to pay her \$200 a year to support and maintain his minor children; but by the settlement and agreement made between her and him and his creditors, she released him from that obligation, and he is now under no obligation to pay her anything. *Walrath v. Walrath*, 27-399.

When the record shows that a divorce was granted on account of the

habitual drunkenness of the wife, the court cannot hold that it was error to give to her the care and custody of two infant children, in the absence of any showing that the husband was a suitable person to have such care and custody. *Brandon v. Brandon*, 14-342.

(4464) **§ 646. Property Rights, etc.; Alimony.** When a divorce shall be granted by reason of the fault or aggression of the husband, the wife shall be restored to all her lands, tenements and hereditaments not previously disposed of, and restored to her maiden name, if she so desires, and shall be allowed such alimony out of her husband's real and personal property as the court shall think reasonable, having due regard to the property which came to him by marriage, and the value of his real and personal estate at the time of said divorce, which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or installments, as the court may deem just and equitable; and if the wife survive her husband, she shall also be entitled to her right of dower in the real estate of her husband, not allowed her as alimony, of which he was seized at the time during the coverture, to which she had not relinquished her right of dower; but if the divorce shall arise by reason of the fault or aggression of the wife, she shall be barred of all right of dower in the lands of which her husband shall be seized at the time of the filing of the petition for divorce, or which he may thereafter acquire, whether there be issue or not; and the court shall order restoration to her of the whole of her lands, tenements or hereditaments not previously disposed of, and also such share of her husband's real or personal property or both, as to such court may appear just and reasonable. [L. 1870, ch. 87, § 27 (§ 646, as amended); took effect May 12, 1870.]

In view of all the circumstances of the case, although the alimony allowed was liberal, yet we are not prepared to say it was unreasonable or exorbitant; therefore we cannot say that the trial court abused its discretion when it gave to the wife one-half the farm. *Avery v. Avery*, 33-6.

(*Amendment 1879.*) The legislature undoubtedly intended that the divorced wife should not have any interest in her former husband's estate greater than that allowed by the court as alimony, and the mere right of dower; and dower only after some act should be passed giving to wives or widows a right of dower in their deceased husband's estates. *Crane v. Fipps*, 29-589.

Section 646 not passed upon. *Martz v. Newton*, 29-334.

Alimony allowed to a wife on a decree for divorce from the bonds of matrimony by reason of the fault or aggression of the husband, under the *tatute* in this state, is to be based upon the circumstances of the parties at

the time of the divorce, and is not to be modified by subsequent changes in these circumstances. The court has no power, on subsequent application showing circumstances thereafter arising, to increase or diminish the allowance given in the original judgment. *Mitchell v. Mitchell*, 20-665.

Upon granting a divorce to the husband, by reason of the fault or aggression of the wife, the court has the power to decree the sum allowed as alimony to the wife a lien upon the real estate of the husband, and, under such a decree, the premises occupied by such husband and wife as a homestead at the date of the decree of divorce may be sold in satisfaction of said lien. Interest at twelve per cent. may be allowed on a decree for alimony on failure to pay. *Blankenship v. Blankenship*, 19-159.

Where the decree of divorce contained no other order concerning property than one barring defendant of all right and interest in the property of plaintiff: *Held*, That this order must stand with the decree, and the decree being undisturbed, the order could not be set aside. *Lewis v. Lewis*, 15-181.

Upon granting a divorce, whether on account of the fault of the wife or the husband, the court has power to award to her the possession of the homestead. *Brandon v. Brandon*, 14-342.

(4465) **§ 647. Effect; Review; Bigamy.** A divorce granted at the instance of one party shall operate as a dissolution of the marriage contract as to both, and shall be a bar to any claim of the party, for whose fault it was granted, in or to the property of the other; and no proceeding for reversing or vacating the judgment or decree divorcing said parties shall be commenced unless within six months after the rendition of said judgment or decree, and during said six months and the pendency of said proceeding for reversing or vacating said judgment or decree it shall be unlawful for either of said parties to marry, and any person so marrying shall be deemed guilty of bigamy: *Provided*, Such decree shall be final; and no proceedings in error to the supreme court shall be allowed or taken unless a notice of an intention to prosecute such proceedings in error be given in open court and noted on the journal of the court, within three days after the entry of the decree or judgment, and the petition in error and transcript be filed in the supreme court within three months after the rendition of such judgment or decree. [L. 1881, ch. 126, § 1 (§ 647, as amended); took effect May 10, 1881.]

A divorce granted at the instance of one party operates as a dissolution of the marriage contract as to both, and leaves them at liberty to contract other marriages the same as though the first had never subsisted. *Baughman v. Baughman*, 32-544.

Also the notice of the plaintiff, entered on the journal of the district court, of her intention to prosecute proceedings in error to the supreme

court, was likewise a nullity; for § 647 of the civil code, as amended in 1881, provides that such notice shall be given in open court, while in fact this notice was not given in open court, but was given in vacation. *Earls v. Earls*, 27-541.

(4466) **§ 648. Marriage Void.** When either of the parties to a marriage shall be incapable, from want of age or understanding, of contracting such marriage, the same may be declared void by the district court, in an action brought by the incapable party; but the children of such marriage, begotten before the same is annulled, shall be legitimate. Cohabitation after such incapacity ceases, shall be a sufficient defense to any such action.

This section makes provision only for incapables to bring action to have a marriage to which such person is a party declared void; but independent of this statute, and the sections of the law relating to divorce, the district court, on the application of either party to such a marriage, has jurisdiction to hear the cause, investigate the charge, and to afford the requisite relief. *Powell v. Powell*, 18-381.

(4467) **§ 649. Alimony.** The wife may obtain alimony from the husband without a divorce, in an action brought for that purpose in the district court, for any of the causes for which a divorce may be granted. The husband may make the same defense to such action as he might to an action for divorce, and may, for sufficient cause, obtain a divorce from the wife in such action.

Alimony, without a divorce, may be obtained only for the same causes for which a divorce may be obtained. *Birdzell v. Birdzell*, 33-437.

There is no statute requiring that either party should be a resident of the state of Kansas, in order that the action for alimony may be maintained; and the statute requiring a residence for one year on the part of "the plaintiff in an action for divorce," does not apply in an action for alimony. *Litowich v. Litowich*, 19-456.

Wife may in some cases sue directly for support. *Jenness v. Cutler*, 12-517.

(4468) **§ 650. Evidence.** Upon the trial of an action for a divorce, or for alimony, the court may admit proof of the admissions of the parties to be received in evidence, carefully excluding such as shall appear to have been obtained by connivance, fraud, coercion or other improper means. Proof of cohabitation, and reputation of the marriage of the parties, may be received as evidence of the marriage. But no divorce shall be granted without proof.

(4469) **§ 651. Residence of the Wife.** A wife who resides in this state at the time of applying for a divorce, shall be

deemed a resident of this state, though her husband resides elsewhere.

(4470) § 651*a*. **Parties May Testify.** In any action for a divorce hereafter tried, the parties thereto, or either of them, shall be competent to testify in like manner, and respecting any fact necessary or proper to be proven, as parties to other civil actions are allowed to testify. [L. 1871, ch. 116, § 6; took effect March 16, 1871.]

The guardian of an insane woman cannot bring and maintain an action against her husband for divorce and alimony or for alimony alone. *Birdzell v. Birdzell*, 33-433.

ARTICLE 29—OFFICES AND FRANCHISES.

SEC.

652. Writ of *quo warranto* abolished; remedy by civil action.

653. Action may be brought, in what cases.

654. When prosecuted in name of state; when in name of person; petition in usurpation of office.

655. Judgment in case contesting right to office.

SEC.

656. Proceedings upon judgments for person entitled.

657. Order of court enforced by attachment.

658. Separate action for damages; judgment of ouster.

659. Costs, how collected in case of judgment against a corporation.

(4471) § 652. **Writ Abolished.** The writ of *quo warranto*, and proceedings by information in the nature of *quo warranto*, are abolished, and the remedies heretofore obtainable in those forms may be had by civil action.

Quo warranto is, so far at least as its procedure is concerned, a civil action. *State v. Wilson*, 30-669.

When a county treasurer has, by acts and omissions, forfeited his right to further hold his office (under § 180, p. 294, Gen. Stat.), the office becomes vacant only by the judgment in an action of *quo warranto*. *Graham v. Cowgill*, 13-115.

The state, or any individual who may be entitled to hold the office, may maintain an action in the nature of *quo warranto* to oust the usurper; but the two do not have a joint action. *Bartlett v. State*, 13-102.

The mere grant of jurisdiction to a particular court, without words of exclusion as to other courts previously possessing the like powers, will only have the effect of conferring concurrent jurisdiction. *Shoemaker v. Brown*, 10-391.

Necessary qualifications of electors; no restriction on account of color. Final judgment, unappealed from, conclusive between parties. As to *res adjudicata* in this case, *quære*. *Anthony v. Halderman*, 7-60.

The legislature has not destroyed the constitutional jurisdiction of the supreme court in *quo warranto*. *State v. Allen*, 5-213.

(4472) § 653. **In What Cases.** Such action may be brought in the supreme court or in the district court, in the following cases: *First*, When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, or shall claim any franchise within this state, or any office in any corporation created by authority of this state. *Second*, Whenever any public officer shall have done or suffered any act which, by the provisions of law, shall work a forfeiture of his office. *Third*, When any association or number of persons shall act within this state as a corporation without being legally incorporated. *Fourth*, When any corporation do or admit [omit] acts which amount to a surrender or a forfeiture of their rights and privileges as a corporation, or when any corporation abuses its power or exercises powers not conferred by law. *Fifth*, Where any corporation claims, by virtue of a congressional grant, any of the public lands or Indian lands to which the Indian title or right of occupancy has been extinguished. *Sixth*, For any other cause for which a remedy might have been heretofore obtained by writ of *quo warranto*, or information in the nature of *quo warranto*. [L. 1871, ch. 116, § 1 (§ 653, as amended); took effect March 16, 1871.]

Whenever a municipal corporation usurps any power which might be conferred upon it by the sovereign power of the state, but which has not been so conferred, such corporation may be ousted from the exercise of such power by a civil action in the nature of a *quo warranto* in the supreme court. *State v. Topeka*, 31-454.

It is conceded by counsel representing the city, that the state has the right to maintain this action, provided the alleged corporate right, which it claims has been usurped, is in reality a corporate right or franchise within the meaning of the law. *State v. Topeka*, 30-656.

(*Subd. 4.*) Of course, attempting to carry on the business of insurance in defiance of the laws of the state, the defendants are liable to the action of *quo warranto*. *State v. Insurance Co.*, 30-588.

And the judgment of dissolution can probably be rendered only in an action in the nature of *quo warranto*, but such judgment of dissolution may be rendered in any case for misuser or non-user of the corporate franchises of the association, whenever such misuser or non-user has been long continued, willful and persistent. *State v. Pipher*, 28-131.

In mandamus or *quo warranto*, an individual person can no longer sue in the name of the state, but he must prosecute his action in his own name. (11-66; 13-102.) *Crowell v. Ward*, 16-61.

Action of *quo warranto* maintained. *State v. Conn*, 14-218.

Fraudulent organization of new county, obtained through falsehood, may be inquired into by an action in the supreme court. *State v. Commissioners*, 12-441.

Without deciding whether the defendant, as a matter of strict right, is entitled to a jury trial or not, but as he demands to be tried by a jury, we shall send all issues of fact in this case to a jury for trial. The legislature, by abolishing the writ of *quo warranto* and proceedings by information in the nature of *quo warranto*, has not thereby destroyed the constitutional jurisdiction of the supreme court in such cases. Action to inquire by what authority — continues to exercise the functions of county clerk after he had forfeited the office. The county attorney of Jefferson county is the proper person to commence and prosecute this action. *State v. Allen*, 5-221.

(4473) **§ 654. In What Name.** When the action is brought by the attorney general or the county attorney of any county of his own motion, or when directed to do so by competent authority, it shall be prosecuted in the name of the state, but where the action is brought by a person claiming an interest in the office, franchise or corporation, or claiming any interest adverse to the franchise, gift or grant, which is the subject of the action, it shall be prosecuted in the name and under the direction, and at the expense of such person; whenever the action is brought against a person for usurping an office by the attorney general or the county attorney, he shall set forth in the petition the name of the person rightfully entitled to the office, and his right or title thereto; when the action in such case is brought by the person claiming title, he may claim and recover any damage he may have sustained. [L. 1871, ch. 116, § 2 (§ 654, as amended); took effect March 16, 1871.]

In mandamus or *quo warranto*, an individual person can no longer sue in the name of the state, but he must prosecute his action in his own name. (11-66; 13-102.) *Crowell v. Ward*, 16-61.

Private individuals, who have no interest other than as citizens, residents and taxpayers of a municipal corporation, cannot maintain an action of *quo warranto* against such corporation. *Miller v. Town*, 12-14.

As the law stands, the action of *quo warranto* was properly brought by the county attorney, to test the right of county clerk to hold office. *State v. Allen*, 5-213.

(4474) **§ 655. Right to Office; Judgment.** In every case contesting the right to an office, judgment shall be rendered according to the rights of the parties, and for the damages the plaintiff or person entitled may have sustained, if any, to the time of the judgment.

(4475) **§ 656. Proceedings; Judgment.** If judgment be rendered in favor of the plaintiff or person entitled, he shall proceed to exercise the functions of the office, after he has been qualified as required by law; and the court shall order the defendant to deliver over all the books and papers in his cus-

tody or within his power, belonging to the office from which he shall have been ousted.

Injunction will lie in favor of clerk and treasurer *de facto* of school district, to restrain the director and the other two persons acting with him from further interfering during the pendency of said action of *quo warranto*, with the right of said clerk and treasurer *de facto* (they being a majority of the school-district board, and acting for the board) to take charge of and use and control said school house. *Brady v. Sweetland*, 13-41.

(4476) § 657. **Order Enforced.** If the defendant shall refuse or neglect to deliver over the books and papers, pursuant to the order, the court, or judge thereof, shall enforce the order by attachment and imprisonment.

(4477) § 658. **Damages; Ouster.** When judgment is rendered in favor of the plaintiff, he may, if he has not claimed his damages in the action, have a separate action for the damages at any time within one year after the judgment. The court may give judgment of ouster against the defendant, and exclude him from the office, franchise or corporate rights; and in cases of corporations, that the same shall be dissolved.

(4478) § 659. **Costs.** If judgment be rendered against any corporation, or against any persons claiming to be a corporation, the court may cause the costs to be collected by execution against the persons claiming to be a corporation, or by attachment against the directors or other officers of the corporation, and may restrain any disposition of the effects of the corporation, appoint a receiver of its property and effects, take an account, and make a distribution thereof among the creditors and persons entitled.

ARTICLE 30—HABEAS CORPUS.

SEC.

- 660. Who may prosecute writ of *habeas corpus*.
- 661. Application, how made; petition shall specify what.
- 662. Writ may be granted, by whom.
- 663. Shall be directed to whom; its command.
- 664. When directed to sheriff, to be delivered without delay.
- 665. When directed to other person, it shall be served by sheriff.
- 666. How served when person cannot be found.
- 667. Immediate return to be made; obedience enforced by attachment.
- 668. Return shall state what.

SEC.

- 669. Hearing may be adjourned, when; plaintiff may except to return, or allege new matter.
- 670. Cause to be heard, and party discharged, when.
- 671. Cases in which party shall not be discharged.
- 672. Person shall not be discharged for want of bail or defect in process.
- 673. Writ may be had for letting to bail.
- 674. Person interested in detention, to be notified before prisoner discharged.
- 675. Power of court over witnesses.

SEC.

676. Officer not liable in civil action for obeying writ.
 677. When warrant may issue to sheriff to bring person in custody before court.
 678. Warrant may issue for the person causing the restraint.
 679. Writ, how executed; return and proceedings.

SEC.

680. Temporary orders; custody of party may be changed.
 681. Writ may be served on Sunday, when.
 682. Writs to be issued by whom; amendments.
 683. Writ shall be granted in favor of parent, guardian, etc.
 684. No security for costs required.

(4479) § 660. **Writ.** Every person restrained of his liberty, under any pretense whatever, may prosecute a writ of *habeas corpus* to inquire into the cause of the restraint, and shall be delivered therefrom when illegal.

The supreme court has no greater power than the district court and probate court to inquire into the regularity of proceedings upon which a person is restrained of his liberty; and no court can inquire into "the legality of a warrant or commitment" issued from any court of competent jurisdiction, upon an indictment or information, before final trial and judgment. *Ex parte Phillips*, 7-48.

Where an information has been filed in a court having jurisdiction of the offense, the defendant arrested and put upon trial, a jury sworn, and before testimony is offered a juror is withdrawn, the jury discharged, the case continued and defendant committed for trial at the next term: *Held*, No ground for the discharge of defendant by *habeas corpus*. *Ex parte Phillips*, 7-48.

The restraint of liberty, which is made the subject of inquiry by the writ of *habeas corpus*, is a confinement, custody and illegal restraint of the personal liberty of the party applying for the benefit of the writ; a custody of the body, any duress or restraint of the person, whereby he is prevented from exercising the liberty of going when and where he pleases. A mere moral restraint is not sufficient. Persons discharged on bail are not entitled to the writ directed to their bail. *Territory v. Cutler*, McC.-153.

Under § 660, a commitment for a contempt may be inquired into in a proceeding of *habeas corpus*; *semble*, not so in many states. Questions properly appertaining to and requiring review, or raising points of error, should not be considered in proceedings of *habeas corpus*, for they would convert the writ of *habeas corpus* into a writ of error, and not one of constitutional liberty. *In re Mitchell*, McC.-256.

(4480) § 661. **Application; Petition.** Application for the writ shall be made by petition, signed and verified either by the plaintiff or by some person in his behalf, and shall specify: *First*, By whom the person in whose behalf the writ is applied for is restrained of his liberty, and the place where, naming all the parties, if they are known, or describing them, if they are not known. *Second*, The cause or pretense of the restraint, according to the best of the knowledge and belief of the applicant. *Third*, If the restraint be alleged to be illegal, in what the illegality consists.

Before a court or judge should allow the writ, enough should appear in the application for the court to form some judgment on the case. *Ex parte Nye*, 8-99.

(4481) **§ 662. Writ Granted; Time.** Writs of *habeas corpus* may be granted by any court of record in term time, or by a judge of any such court, either in term or vacation; and upon application the writ shall be granted without delay.

Supreme court and probate court both may have original jurisdiction in *habeas corpus*. *Shoemaker v. Brown*, 10-391.

(4482) **§ 663. Writ; Its Command.** The writ shall be directed to the officer or party having the party under restraint, commanding him to have such person before the court or judge, at such time and place as the court or judge shall direct, to do and receive what shall be ordered concerning him, and have then and there the writ.

(4483) **§ 664. Delivered.** If the writ be directed to the sheriff, it shall be delivered by the clerk to him without delay.

(4484) **§ 665. To Other Person; Service.** If the writ be directed to any other person, it shall be delivered to the sheriff, and shall be by him served by delivering the same to such person without delay.

(4485) **§ 666. Not Found, Service.** If the person to whom such writ is directed cannot be found, or shall refuse admittance to the sheriff, the same may be served by leaving it at the residence of the person to whom it is directed, or by affixing the same on some conspicuous place, either of his dwelling house or where the party is confined or under restraint.

(4486) **§ 667. Immediate Return.** The sheriff or other person to whom the writ is directed shall make immediate return thereof, and if he neglect or refuse, after due service, to make return, or shall refuse or neglect to obey the writ by producing the party named therein, and no sufficient excuse be shown for such neglect or refusal, the court shall enforce obedience by attachment.

(4487) **§ 668. Return Shall State What.** The return must be signed and verified by the person making it, who shall state: *First*, The authority or cause of restraint of the party in his custody. *Second*, If the authority be in writing, he shall return a copy and produce the original on the hearing. *Third*, If he has had the party in his custody or under his restraint, and has transferred him to another, he shall state to whom, the time, place and cause of the transfer. He shall produce the party on the hearing, unless prevented by sickness or infirmity, which must be shown in the return.

(4488) **§ 669. Hearing; Plaintiff may Except to Return.** The court or judge, if satisfied of the truth of the allegation of sickness or infirmity, may proceed to decide on the return, or the hearing may be adjourned until the party can be produced, or for other good cause. The plaintiff may except to the sufficiency of, or controvert the return or any part thereof, or allege any new matter in avoidance; the new matter shall be verified, except in cases of commitment on a criminal charge; the return and pleadings may be amended without causing any delay.

(4489) **§ 670. Discharge.** The court or judge shall thereupon proceed in a summary way to hear and determine the cause; and if no legal cause be shown for the restraint or for the continuance thereof, shall discharge the party.

(4490) **§ 671. When not Discharged.** No court or judge shall inquire into the legality of any judgment or process, whereby the party is in custody, or discharge him when the term of commitment has not expired in either of the cases following: *First*, Upon process issued by any court or judge of the United States, or where such court or judge has exclusive jurisdiction; or, *Second*, Upon any process issued on any final judgment of a court of competent jurisdiction; or, *Third*, For any contempt of any court, officer or body having authority to commit; but an order of commitment as for a contempt, upon proceedings to enforce the remedy of a party, is not included in any of the foregoing specifications; *Fourth*, Upon a warrant or commitment issued from the district court, or any other court of competent jurisdiction, upon an indictment or information.

This section does not prohibit a court having jurisdiction in proceedings by *habeas corpus* from examining the judgment or commitment of another court under which a person is restrained of his liberty. *In re Dill*, 32-668.

The facts stated in the charge against petitioner (forfeiture of recognizance) on which he was convicted, do not constitute a contempt for which he can be punished by fine or imprisonment. The judgment rendered was not warranted by law, and the court was without jurisdiction to render it, and the imprisonment under it is illegal, and the petitioner is entitled by proceedings in *habeas corpus* to be discharged from imprisonment. *In re Dill*, 32-668.

We pass over all irregularities in the proceedings of the police judge, and of the city marshal and the sheriff, as mere irregularities that cannot be inquired into in proceedings in *habeas corpus*. The only question for us to consider is, whether the police judge had jurisdiction to render a judgment similar to the one which he did render. *Franklin v. Westfall*, 27-618.

Where a complaint is filed under the dramshop act, which does not in

terms charge a sale without a license, but charges generally an unlawful selling, and the defendant, pleading not guilty, goes to trial, is convicted and sentenced: *Held*, That the complaint is not such an absolute nullity as will entitle the defendant to a discharge by *habeas corpus*. *Prohibitory Amendment Cases*, 24-725.

There is no prohibition in this section to prevent a court or judge from inquiring into the legality of the imprisonment of a person under a commitment of an examining magistrate. *In re Snyder*, 17-552.

The petition states that the applicant is in custody by virtue of process issued on a final judgment of a court of competent jurisdiction. This fact precludes any discharge by *habeas corpus*. *Ex parte Nye*, 8-100.

When an information has been filed in a court having jurisdiction of the offense, the defendant arrested and put upon trial, a jury sworn, and before testimony is offered a juror is withdrawn, the jury discharged, the case continued, and defendant committed for trial at the next term: *Held*, No ground for the discharge of defendant by *habeas corpus*. *Ex parte Phillips*, 7-48.

(4491) § 672. **For Want of Bail.** No person shall be discharged from an order of commitment issued by any judicial or peace officer for want of bail, or in cases not bailable, on account of any defect in the charge or process, or for alleged want of probable cause; but in all such cases, the court or judge shall summon the prosecuting witnesses, investigate the criminal charge, and discharge, let to bail or recommit the prisoner, as may be just and legal, and recognize witnesses when proper.

While the proceedings in *habeas corpus* were pending before the judge, unquestionably he had power to take the recognizance. *Bloss v. State*, 11-464.

When a writ of *habeas corpus* issues on a complaint of illegal imprisonment, for alleged want of probable cause, the judge or court issuing the writ may, even in cases where there is no defect in the charge or process, summon the prosecuting witness, investigate the criminal charge, and discharge, let to bail or recommit the prisoner, as may be just and legal. *In re Snyder*, 17-552.

(4492) § 673. **Bail.** The writ may be had for the purpose of letting a prisoner to bail in civil and criminal actions.

While the proceedings in *habeas corpus* were pending before the judge, unquestionably he had power to take the recognizance. *Bloss v. State*, 11-464.

(4493) § 674. **Notice.** When any person has an interest in the detention, the prisoner shall not be discharged until the person having such interest is notified.

(4494) § 675. **Power of Court.** The court or judge shall

have power to require and compel the attendance of witnesses, and to do all other acts necessary to determine the case.

(4495) **§ 676. Officers not Liable.** No sheriff or other officer shall be liable to a civil action for obeying any writ of *habeas corpus* or order of discharge made thereon.

(4496) **§ 677. Warrant may Issue.** Whenever it shall appear by affidavit that any one is illegally held in custody or restraint, and that there is good reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ can be enforced, such court or judge may cause a warrant to be issued, reciting the facts, and directed to the sheriff or any constable of the county, commanding him to take the person thus held in custody or restraint, and forthwith bring him before the court or judge, to be dealt with according to law.

(4497) **§ 678. Party Causing Restraint; Arrest.** The court or judge may also, if the same be deemed necessary, insert in the warrant a command for the apprehension of the person charged with causing the illegal restraint.

(4498) **§ 679. How Executed; Return.** The officer shall execute the writ by bringing the person therein named before the court or judge; and the like return and proceedings shall be required and had as in case of writs of *habeas corpus*.

(4499) **§ 680. Temporary Orders.** The court or judge may make any temporary orders in the cause or disposition of the party during the progress of the proceedings, that justice may require. The custody of any party restrained may be changed from one person to another, by order of the court or judge.

(4500) **§ 681. Served on Sunday.** Any writ or process authorized by this article, may be issued and served, in case of emergency, on Sunday.

The writ of *habeas corpus* is authorized to be served in case of emergency on Sunday. By § 2, ch. 90, Comp. Laws 1879, any person who knowingly serves any process issued from a justice's court in a civil suit on Saturday, or returnable on Saturday, upon a person whose religious faith is to keep Saturday as the Sabbath of rest, is declared guilty of a misdemeanor. These provisions impliedly recognize the continuance of the common-law rule of the invalidity of the service upon Sunday of ordinary civil process. (13-529; 16-488; 21-238.) *Morris v. Shew*, 29-663.

(4501) **§ 682. Writs Issued; Seal; Service; Amendments.** All writs and other process, authorized by the provisions of this article, shall be issued by the clerk of the court,

and, except summons, sealed with the seal of such court, and shall be served and returned forthwith, unless the court or judge shall specify a particular time for any such return. And no writ or other process shall be disregarded for any defect therein, if enough is shown to notify the officer or person of the purport of the process. Amendments may be allowed, and temporary commitments, when necessary.

(4502) **§ 683. Parent, Guardian, etc.** Writs of *habeas corpus* shall be granted in favor of parents, guardians, masters and husbands; and to enforce the rights, and for the protection of, infants and insane persons; and the proceedings shall, in all such cases, conform to the provisions of this article.

(4503) **§ 684. No Security for Costs.** No deposit or security for costs shall be required of an applicant for a writ of *habeas corpus*.

ARTICLE 31—WASTE.

Sec. 685. Action of waste abolished.

(4504) **§ 685. Action Abolished.** The action of waste is abolished, but any proceeding heretofore commenced or judgment rendered or right acquired, shall not be affected thereby; and where the action of waste is specially mentioned and authorized in any statute, it may be used until otherwise provided; but it shall be commenced, and proceeded in throughout, in the manner prescribed for the civil action of this code. Wrongs heretofore remediable by actions of waste, are subjects of actions as other wrongs, and the same relief shall be granted as may now be granted under the action of waste.

Action of waste must be prosecuted under the one form—§ 10. *Fitzpatrick v. Gebhart*, 7–43.

ARTICLE 32—ACTIONS ON OFFICIAL SECURITIES.

SEC.

686. Who may bring action on forfeited bond; proceedings.

SEC.

687. Judgment no bar to another action.

(4505) **§ 686. Plaintiff.** When an officer, executor or administrator within this state, by misconduct or neglect of duty, forfeits his bond or renders his sureties liable, any person injured thereby, or who is, by law, entitled to the benefit of the security, may bring an action thereon in his own name, against the officer, executor or administrator and his sureties, to re-

cover the amount to which he may be entitled by reason of the delinquency. The action may be instituted and proceeded in on a certified copy of the bond, which copy shall be furnished by the person holding the original thereof.

Party coming of age may sue in his own name his guardian and securities, on bond executed in the name of state of Kansas as obligee. *Crowell v. Ward*, 16-16.

Action on bond of treasurer of school district should be in name of district. *Coffman v. Parker*, 11-13.

County commissioners may sue on county treasurer's bond, for all moneys received by virtue of his office, whether belonging to state, county, township, school or other fund. *Comm'rs v. Craft*, 6-152.

(4506) **§ 687. Judgment.** A judgment in favor of a party for one delinquency does not preclude the same or another party from an action on the same security for another delinquency.

ARTICLE 33—PROCEEDINGS UPON MANDAMUS.

SEC.

688. Writ issued to whom, and for what purpose.

689. May not issue, in what cases.

690. Writ alternative or peremptory.

691. When peremptory.

692. Motion to be made upon affidavit.

693. How allowed and served.

694. The answer.

SEC.

695. Peremptory mandamus if no answer; new matter in answer.

696. No pleading but writ and answer; issues to be tried.

697. Judgment for plaintiff.

698. Recovery of damages a bar to other action.

699. Penalty for officer neglecting to perform duty enjoined.

(4507) **§ 688. Issue; Purpose.** The writ of mandamus may be issued [awarded] by the supreme court or the district court, or any justice or judge thereof, during term, or at chambers, to any inferior tribunal, corporation, board or person, to compel the performance of any act which the law specially enjoins as a duty, resulting from an office, trust or station; but though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion. [L. 1870, ch. 87, § 28 (§ 688, as amended); took effect May 12, 1870.]

We think the writ was valid. It was really issued by both the judge and the clerk, although the allowance thereof was made by the judge alone, as provided by the statute. *State v. King*, 29-614.

The plaintiff in error also claims that the granting of a change of venue is a matter of pure "judicial discretion;" and therefore, that under § 688 of the civil code, it cannot be controlled by mandamus. * * * If the application, when the justice is finally called upon to act upon it, is sufficient,

he must grant the change of venue; but if the application is not sufficient, he must refuse it. (Upon a similar question, see 1-365.) *Herbert v. Beahard*, 26-752.

Mandamus refused, to compel bridge company to rebuild bridge over the Republican river, and forever keep it in repair. *State v. Bridge Co.*, 20-411.

Refusal of probate court to make an inquiry again into the sanity of an individual already adjudged insane, cannot be reversed by mandamus. *State v. Norton*, 20-506.

A mere grant of jurisdiction to a particular court, without words of exclusion as to other courts previously possessing the like powers, will only have the effect of constituting the former a court of concurrent jurisdiction with the latter. *Shoemaker v. Brown*, 10-392.

A mandamus will not lie to compel a private individual to do an act not resulting from an office, trust or station, and not especially enjoined upon such individual by law. *Hussey v. Hamilton*, 5-462.

Under the laws of 1868, this action should be brought in the name of the party in interest as plaintiff, and not in the name of the state. (But see ch. 79, L. 1871.) *State v. Marston*, 6-536.

(*Code 1859*, § 580.) In an action by the relator, claiming that he was elected state senator, against the board of state canvassers, to prevent their counting certain votes alleged to be illegal under §§ 580 and 581, (*code 1859*), a want of a plain and adequate remedy in the ordinary course of the law is an essential prerequisite to the issuance of the writ in every case. *Held*, That the writ, whether alternative or peremptory, must in addition show the obligation of the respondents to perform the act, and also show them to be in default in the performance of their legal duties. *State v. Carney*, 3-90.

(4508) **§ 689. May not Issue.** This writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law. It may issue on the information of the party beneficially interested.

Action on guaranty proper remedy for failing to keep bridge in repair, and not mandamus. *State v. Bridge Co.*, 20-404.

Contract not involving a trust, will not be enforced by mandamus. *State v. Bridge Co.*, 20-404.

Mandamus cannot control judicial discretion, nor correct errors in judicial proceedings. *State v. Norton*, 20-506.

Mandamus not proper remedy to compel conveyance of town site to town company. *Independence Town Co. v. DeLong*, 11-152.

The action of mandamus, where there is no special provision otherwise made, should be brought in the name of the real party in interest. (6-524.) *State v. Commissioners*, 11-70.

Mandamus will not lie at the instance of a private citizen to compel the performance of a purely public duty. *Turner v. Commissioners*, 10-15.

Where, in the trial of a cause, a verdict is agreed upon by the jury, and

reduced to writing in due form, and brought into court by the jury, it is the duty of the court to receive and enter the verdict; and for a refusal so to do the writ of mandamus is an appropriate remedy, and the only one that affords adequate relief. *Munkers v. Watson*, 9-668.

Mandamus will not lie against a private person. *Elsbree v. Bridgman*, 8-458.

Mandamus will not be granted when there is a remedy at law. (3-88; 4-250.) *Elsbree v. Bridgman*, 8-458.

Under ch. 27, L. 1869, there was a remedy at law to avoid an election to relocate county seat, on the ground that such election is illegal. *State v. Ayres*, 7-101.

Mandamus is not the proper remedy to try and determine the right of either party to a permanent enjoyment of an office. *Hussey v. Hamilton*, 5-462.

The facts show that the money is now in the hands of the treasurer, that it is due to the relator, and he refuses to pay it over. Is there not a plain and adequate remedy in the ordinary course of law? *State v. Commissioners*, 4-260.

Mandamus will not lie until there has been a default on the part of the respondents (3-81); hence, an application by a person interested, to the council of a city of second class, for a reassessment and relevy of an informal tax, under subdivision 42, of § 2, art. 3, of the Laws of 1867, p. 120, cannot be enforced by the writ of mandamus, except at the time fixed for levying general taxes. *State v. City of Wyandotte*, 4-430.

The issuance of county orders for the claims of a county attorney for allowances made by the judge of the district court (L. 1864, p. 58) cannot be enforced by *mandamus*, but must, like all other claims against a county, be audited by the county commissioners. (L. 1865, p. 75.) *State v. Bonebrake*, 4-246.

Mandamus to compel secretary of state to issue certificate of election to state senate; court cannot go behind the canvass made under § 36 of the law. *State v. Lawrence*, 3-95.

Motion for mandamus to compel levy of tax (ch. 63, L. 1863,) denied. Act void. *State v. Leavenworth Co.*, 2-66.

It is the duty of court of contest for trial of contested elections (§ 13, ch. 89, C. L. 1862) to sign a bill of exceptions to their decisions. Writ of mandamus granted to compel them to do so, as of the date of the sitting of the court, on their refusal being shown by the relator. *State v. Sheldon*, 2-322.

On return of full compliance of the writ, the court declined to hear proof that the bill of exceptions was not true. *State v. Sheldon*, 2-322.

A showing by affidavit that the relator is register of deeds of B. county; that as such he applied to respondent, who is register of deeds of M. county, to transcribe the records of the latter county affecting real estate of that portion of M. county annexed by law to B. county, and that respondent refused to permit him so to do, entitles the relator to an alternative writ of mandamus. *State v. Meadows*, 1-90.

Mandamus will not lie to compel a public officer to do an official act,

unless the act be ministerial, and not discretionary. *State v. Robinson*, 1-188.

(4509) **§ 690. Alternative or Peremptory.** The writ is either alternative or peremptory. The alternative writ must state, concisely, the facts, showing the obligation of the defendant to perform the act, and his omission to perform it, and command him that immediately upon receipt of the writ, or at some other specified time, he do the act required to be performed or show cause before the court whence the writ issued, at a specified time and place, why he has not done so; and that he then and there return the writ with his certificate of having done as he is commanded. The peremptory writ must be in a similar form, except that the words requiring the defendant to show cause why he has not done as commanded, must be omitted.

The action of mandamus, where there is no special provision otherwise made, should be brought in the name of the real party in interest. *State v. Commissioners*, 11-70.

No mere errors committed by the court or judge in the mandamus proceedings, or in issuing the writ, can be set up by the defendants as a defense for their failure or refusal to obey the commands of the writ. *State v. King*, 29-608.

Service should be made by delivering to the defendants the original writ and not a copy; and where so served, *held*, that they were not guilty of contempt. *State v. King*, 29-608.

(4510) **§ 691. When Peremptory.** When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance; in all other cases, the alternative writ must be first issued.

(4511) **§ 692. Motion upon Affidavit; Notice.** The motion for the writ must be made upon affidavit, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

(4512) **§ 693. Allowed and Served.** The allowance of the writ must be indorsed thereon, signed by the judge of the court granting it, and the writ must be served personally upon the defendant; if the defendant, duly served, neglect to return the same, he shall be proceeded against, as for a contempt.

We think the writ was valid. It was really issued by both the judge and the clerk, although the allowance thereof was made by the judge alone, as provided by the statute. *State v. King*, 29-614.

(4513) **§ 694. The Answer.** On the return day of the

alternative writ, or such further day as the court may allow, the party on whom the writ shall have been served may show cause, by answer made in the same manner as an answer to a petition in a civil action.

(4514) **§ 695. Peremptory; New Matter.** If no answer be made, a peremptory mandamus must be allowed against the defendant; if answer be made, containing new matter, the same shall not, in any respect, conclude the plaintiff, who may, on the trial or other proceeding, avail himself of any valid objections to [its] sufficiency, or may countervail it by proof, either in direct denial or by way of avoidance.

(4515) **§ 696. Pleadings; Issues; Amendment.** No other pleading or written allegation is allowed than the writ and answer; these are the pleadings in the case, and have the same effect, and are to be construed and may be amended in the same manner, as pleadings in a civil action; and the issues thereby joined must be tried, and the further proceedings thereon had, in the same manner as in a civil action.

These pleadings are to be construed and to have the same effect as pleadings in a civil action, and the issues are to be tried and further proceedings had as in a civil action. Under those rules, a motion to quash the answer is a challenge of the substance of such answer. *Crans v. Francis*, 24-754.

The action of mandamus, where there is no special provision otherwise made, should be brought in the name of the real party in interest. *State v. Commissioners*, 11-70.

(4516) **§ 697. Judgment.** If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury, or by referees, as in a civil action, and costs; and a peremptory mandamus shall also be granted to him without delay.

(4517) **§ 698. Recovery.** A recovery of damages, by virtue of this article, against a party who shall have made a return to a writ of mandamus, is a bar to any other action against the same party for the making of such return.

The action on the case for the false return is now abolished by § 698, and a respondent is now no longer liable to a separate action for making such return. *State v. Commissioners*, 11-70.

(4518) **§ 699. Penalty.** Whenever a peremptory mandamus is directed to any public officer, body or board, commanding the performance of any public duty specially enjoined by law, if it appear to the court that such officer, or any member of such body or board, has, without just excuse, refused or neglected to perform the duty so enjoined, the court may impose

a fine, not exceeding five hundred dollars, upon every such officer or member of such body or board. Such fine, when collected, shall be paid into the treasury of the county where the duty ought to have been performed; and the payment thereof is a bar to an action for any penalty incurred by such officer or member of such body or board, by reason of his refusal or neglect to perform the duty so enjoined.

No mere errors of the court or judge in the mandamus proceedings, or in issuing the writ, can be set up as a defense for failure to obey the commands of the writ. Mandamus to compel levy of tax to pay judgment; purchase of judgment and release by another party will not purge them of contempt. Service of writ should have been made by delivering to the defendants the original writ, and not a mere copy. *State v. King*, 29-608.

ARTICLE 34—GENERAL PROVISIONS APPLICABLE TO THE WHOLE CODE—PROCESS.

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700. Style of process; seal, signature and date.

701. Process, when sheriff a party.

702. Court, etc., may appoint person to serve process; how verified.

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704. Shall enter what on appearance docket.

705. On journal.

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708. Clerk may receive amount of judgment and costs, when; his liability.

709. Writs, orders, etc., to be issued upon precept.

710. Clerk to file papers in every action or special proceeding.

711. Papers in each case, how to be kept.

712. Indorsement upon papers and orders.

713. Entry upon return of summons.

714. Records and books of court.

715. Provisions of this article applicable to clerks of all courts of record.

716. Clerk to exercise what powers and perform what duties.

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717. To indorse upon process, time of receiving it.

718. To execute and return process; liable for neglect.

719. To adjourn court from day to day, until judge attend; further powers and duties.

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720. Duty enjoined upon ministerial officer may be performed by deputy.

721. Affirmation sufficient, when.

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PROVISIONS RESPECTING ACTIONS.

726. Application of the code to suits pending; shall apply to proceedings to enforce or reverse judgment.

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727. Rights of action under existing practice to be enforced under this code, except, etc.

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SEC.

729. When action shall be prosecuted in conformity with this act.

730. Take effect, when.

SEC.

731. Certain publications.

732. The same.

(4519) **§ 700. Process.** The style of all process shall be: "The state of Kansas." It shall be under the seal of the court from whence the same shall issue, shall be signed by the clerk, and dated the day it is issued.

Warrant of commitment, issued upon continuance of a criminal cause from one term to another, is a process of the court, and should be under the seal of the court and signed by the clerk, and not be under the hand of the judge. *Jennings v. State*, 13-80.

Process regular on its face, issued from a court having jurisdiction of the subject-matter, protects an officer in executing it. Such protection may be claimed by any person summoned by the officer to assist him in executing it. *Allen v. Corlew*, 10-70.

(4520) **§ 701. When Sheriff a Party.** An order for a provisional remedy or any other process, in an action wherein the sheriff is a party or is interested, shall be directed to the coroner. If both of these officers are interested, the process shall be directed to and executed by a person appointed, as provided in the next section.

Court ought to permit affidavit to be filed showing that summons was properly issued to the coroner in an action of replevin, because the defendant in the action was a deputy sheriff. *Cassidy v. Fleak*, 20-56.

(4521) **§ 702. Appointment for Serving Process.** The court or judge, or the clerk, in the absence of the judge from the county, for good cause, may appoint a person to serve a particular process or order, who shall have the same power to execute it which the sheriff has. The person may be appointed on the application of the party obtaining the process or order, and the return must be verified by affidavit. He shall be entitled to the same fees allowed to the sheriff for similar services.

DUTIES OF CLERKS.

(4522) **§ 703. Dockets, Journals, etc.** The clerk of the district court shall keep an appearance docket, a trial docket, a journal, a judgment docket, an execution docket, and such other books as may be ordered by the court or required by law.

Where an execution is issued reciting a judgment in favor of the plaintiff for so much costs, and on this execution a sale is made to a stranger to the action: *Held*, That his title will not be defeated by the mere fact that the journal entry of the judgment fails to state the amount of costs taxed. In the absence of the appearance and judgment dockets it will be presumed

that the costs were properly taxed on them, and that the amount stated in the execution is correct. *Merwin v. Hawker*, 31-224.

(4523) **§ 704. Appearance Docket.** On the appearance docket he shall enter all actions in the order in which they are brought, the date of the summons, the time of the return thereof by the officer, and his return thereon, the time of filing the petition, and all subsequent pleadings and papers, and an abstract of all judgments and orders of the court.

(4524) **§ 705. On Journal.** On the journal shall be entered the proceedings of the court of each day, and all orders of the judge in vacation or at chambers, and also all judgments entered on confession or default.

Instructions copied into a transcript, without having been made part of the record in the court below, are not part of the record in this court, and cannot be examined. Entering instructions upon the journal, and noting the exceptions thereto, does not make them a part of the record. *McArthur v. Mitchell*, 7-173.

(4525) **§ 706. Judgment Docket.** The judgment docket shall be kept in the form of an index, in which the name of each person against whom a judgment is rendered shall appear in alphabetical order. A statement of each judgment upon its rendition shall be entered therein, containing the names of the parties, the amount or nature of the judgment and costs, and the date of its rendition; and if the judgment be against several persons, the entry shall be repeated under the name of each person against whom the judgment is rendered, in alphabetical order.

In the absence of the appearance and judgment dockets, it will be presumed that the costs were properly taxed on them, and that the amount stated in the execution is correct. *Merwin v. Hawker*, 31-222.

In an attachment action, where judgment is rendered for so much debt and costs, the judgment for costs is a lien on the property. *Merwin v. Hawker*, 31-222.

(4526) **§ 707. Execution Docket.** In the execution docket the clerk shall enter all executions as they are issued by him. The entry shall contain the names of the parties, the date and amount of the judgment and costs, the date of the execution, and the name of the county to which it is issued. The clerk shall also record in full the return of the sheriff to each execution; and such record shall be evidence of such return, if the original be mislaid or lost.

(4527) **§ 708. Clerk may Collect Judgment and Costs.** When there is no execution outstanding, the clerk of the court

in which the judgment was rendered may receive the amount of the judgment and costs, and receipt therefor, with the same effect as if the same had been paid to the sheriff on an execution; and the clerk shall be liable to be amerced for refusing to pay the same to the party entitled thereto, when requested, and shall also be liable on his official bond.

(4528) **§ 709. Writs, Orders, etc.; Precipe.** All writs and orders for provisional remedies, and process of every kind, shall be issued by the clerks of the several courts, upon a precipe filed with the clerk, demanding the same.

We think the writ was valid. It was really issued by both the judge and the clerk, although the allowance thereof was made by the judge alone, as provided by the statute. *State v. King*, 29-614.

(4529) **§ 710. File Papers.** It is the duty of the clerk of each of the courts, to file together, and carefully preserve in his office, all papers delivered to him for that purpose, in every action or special proceeding.

The failure of the clerk to note the fact of filing of depositions should not deprive the party of the right to use them. *Hogendobler v. Lyon*, 12-281.

(4530) **§ 711. Papers.** He shall keep the papers, in each case, separate, carefully enveloped in a wrapper, labeled with the title of the cause.

(4531) **§ 712. Indorsement.** He shall indorse upon every paper filed with him, the day of filing it; and upon every order for a provisional remedy, and upon every undertaking given under the same, the day of its return to his office.

(4532) **§ 713. Return of Summons.** He shall, upon the return of every summons served, enter upon the appearance docket the name of the defendant or defendants summoned, and the day of the service upon each one. The entry shall be evidence of the service of the summons, in case of the loss thereof.

(4533) **§ 714. Records and Books.** He shall keep the records and books and papers appertaining to the court, and record its proceedings.

(4534) **§ 715. Applicable to what Courts.** The provisions of this article shall, as far as they are applicable, apply to the clerks of all courts of record.

(4535) **§ 716. Powers and Duties.** The clerk of each of the courts shall exercise the powers and perform the duties conferred and imposed upon him by other provisions of this code, by other statutes, and by the common law. In the per-

formance of his duties, he shall be under the direction of his court.

A decree is not invalidated in a collateral attack by the mere omission of the clerk of the court to attach a seal to affidavit for publication taken before him, when such affidavit, prior to the decree, was approved by the court. *Entreken v. Howard*, 16-551.

A warrant is the process of the court, and should be under the seal of the court, and signed by the clerk. *Jennings v. State*, 13-90.

DUTIES OF SHERIFF.

(4536) **§ 717. Sheriff Indorse Process.** The sheriff shall indorse upon every summons, order of arrest, or for the delivery of property, or of attachment or injunction, the day and hour it was received by him.

(4587) **718. Execute and Return; Amercement.** He shall execute every summons, order or other process, and return the same as required by law; and if he fail to do so, unless he make it appear to the satisfaction of the court that he was prevented by inevitable accident from so doing, he shall be amerced by the court in a sum not exceeding one thousand dollars, upon motion and ten days' notice, and shall be liable to the action of any person aggrieved by such failure.

(4538) **§ 719. Adjourn Court, etc.; Sheriff.** If the judge of a court fail to attend at the time and place appointed for holding his court, the sheriff shall have power to adjourn the court, from day to day, until the judge attend, or a judge *pro tem.* be selected; but if the judge be not present in his court, nor a judge *pro tem.* be selected, within two days after the first day of the term, then the court shall stand adjourned for the term. The sheriff shall exercise the powers and duties conferred and imposed upon him by other provisions of this code, by other statutes, and by the common law.

(Code 1859, § 605.) Though the judge may not be present on the day fixed by law for the commencement of the term, yet it is the first day of the term. *Bush v. Day*, 1-86.

MISCELLANEOUS PROVISIONS.

(4539) **§ 720. Deputy.** Any duty enjoined by this code upon a ministerial officer, and any act permitted to be done by him, may be performed by his lawful deputy.

Deputy clerk of district court may administer oaths. *Ferguson v. Smith*, 10-404.

(4540) **§ 721. Affirmation.** Whenever an oath is required

by this code, the affirmation of a person, conscientiously scrupulous of taking an oath, shall have the same effect.

(4541) **§ 722. Computation of Time.** The time within which an act is to be done, shall be computed by excluding the first day, and including the last; if the last day be Sunday, it shall be excluded.

Applied to mechanic's lien statement. *Conroy v. Perry*, 26-474.

In publication, to make the forty-one days in this case, the answer day must be included, if the day of the first publication be excluded. *Beckwith v. Douglass*, 25-231.

The ordinary rule of computation, excluding the first and including the last day, applies to continuance for publication. *Warner v. Bucher*, 24-479.

If the justice fails to enter judgment by the fourth day, under § 115, justices' code, but does enter it thereafter, it is error. *Stewart v. Waite*, 19-220.

In computing the time, when the issues were joined by filing a reply, on 27th of August, the action was triable at the term which commenced on September 6th, following. The rule is to exclude the first day of the term and include the day of joining the issues by filing of the last pleading. *Dougherty v. Porter*, 18-209.

Lumber sold on 19th of February, 1870, due that day; action may be brought 19th February, 1873. *Hook v. Bixby*, 13-168.

Granting leave for defendant to file reply to answer of co-defendant after time has elapsed is discretionary. *Douglas v. Rinehart*, 5-393.

(4542) **§ 723. Justification of Surety.** A ministerial officer, whose duty it is to take security in any undertaking provided for by this code or by other statutes, shall require the person offered as surety to make an affidavit of his qualifications, which affidavit may be made before such officer, and shall be indorsed upon or attached to the undertaking. The taking of such an affidavit shall not exempt the officer from any liability to which he might otherwise be subject for taking insufficient security.

It is possibly true that the sureties did not justify in this case, and yet we hardly think that this alone is sufficient ground for a dismissal of the appeal. Section 723 is merely directory. *St. L. L. & D. Rld. v. Wilder*, 17-244.

The court might have required an amendment of the justification of the sureties on the attachment bond, so as to have made it conform to the language of the statute (5-293); but the court could not arbitrarily, and without giving any opportunity to amend, dissolve the attachment for such slight discrepancy as may be found between this justification and the statute. *Ferguson v. Smith*, 10-403.

(4543) **§ 724. Qualifications of Surety.** The surety in

every undertaking provided for by this code or other statute, must be a resident of this state, and worth double the sum to be secured, over and above all exemptions, debts and liabilities. Where there are two or more sureties in the same undertaking, they must, in the aggregate, have the qualifications prescribed in this section.

The court might have required an amendment of the justification of the sureties on the attachment bond, so as to have made it conform to the language of the statute (5-293); but the court could not arbitrarily, and without giving any opportunity to amend, dissolve the attachment for such a slight discrepancy as may be found between this justification and the statute. *Ferguson v. Smith*, 10-403.

(4544) **§ 725. Supreme Court Rules.** The judges of the supreme court shall, during the month of the first June after this code shall take effect, and every two years thereafter, meet at the capital of the state, and revise their general rules, and make such amendments thereto as may be required to carry into effect the provisions of this code, and shall make such further rules consistent therewith as they may deem proper. The rules so made shall apply to the supreme court, the district courts, the probate courts, and all other courts of record.

While doubtless by § 725 the legislature contemplated such action by the justices of the supreme court as would secure uniformity in the practice throughout the state, and while also doubtless any rule prescribed by said justices would supersede and set aside any rule by any district court in respect to the same matter, yet in the absence of any action by the justices of the supreme court, or in respect to any matter in which they have taken no action, we do not doubt the power of the district court to prescribe rules regulating and controlling practice before it. *Jones v. Menefee*, 28-438.

Rule 15, January term, 1865, (2 Kas. 12,) is void. *Coleman v. Newby*, 7-82.

Rule 15, supreme court, requires notice of filing of transcript of appeal from justice to be served in five days. *Robitaille v. Ferguson*, 4-556.

PROVISIONS RESPECTING ACTIONS.

(4545) **§ 726. Code; Suits Pending.** The provisions of this code do not apply to proceedings in actions or suits pending when it takes effect. They shall be conducted to final judgment or decree, in all respects, as if it had not been adopted; but the provisions of this code shall apply after a judgment, order or decree, heretofore or hereafter rendered, to the proceedings to enforce, vacate, modify or reverse it.

PROVISIONS AS TO THE OPERATION OF THE CODE.

(4546) **§ 727. Rights under Existing Practice.** Rights of civil action, given or secured by existing laws, shall be prosecuted in the manner provided for by this code, except as provided in the next section. If a case ever arise in which an action or proceeding for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this code, the practice heretofore in use may be adopted, so far as may be necessary to prevent a failure of justice.

(4547) **§ 728. Certain Proceedings not Affected.** Until the legislature shall otherwise provide, this code shall not affect proceedings to assess damages for private property taken for public uses, nor proceedings under the statutes for the settlement of estates of deceased persons, nor proceedings under statutes relating to apprentices, bastardy, insolvent debtors or any special statutory remedy, not heretofore obtained by action; but such proceedings may be prosecuted under the code whenever it is applicable.

Of course, where a remedy is given by the statute, and the whole procedure for such remedy is also given in the statute or in some other statute, the civil code cannot apply; and where the remedy is such that in the nature of things the civil code cannot apply, it has no application; but where the procedure for the enforcement of the remedy is not given by statute, or where only a portion of the procedure is given by statute, then the civil code must govern so far as it can have any application thereto. *Pritchard v. Commissioners*, 26-588.

Section 728 of the civil code is very similar in some of its provisions to § 320. * * * We never had a common-law procedure for the settlement of estates in Kansas, and it was not intended by the enactment of § 320 to adopt the common-law procedure, or any other procedure or law, and make it applicable where it was not applicable before. *McCartney v. Spencer*, 26-66.

Code, in regard to sales under execution, does not apply to proceedings by administrator in probate court to sell lands. The code specifically declares that it shall not affect "proceedings under the statutes for the settlement of estates of deceased persons." *Fudge v. Fudge*, 23-420.

(4548) **§ 729. Proceedings not Affected.** Where, by statute, a civil action, legal or equitable, is given, and the mode of proceeding therein is prescribed, this code shall not affect the proceeding under such statute, until the legislature shall otherwise provide; but the parties may, if they see fit, proceed under this act, and in all such cases, as far as it may be consistent with the statute giving such action and practicable under this code, the proceedings shall be conducted in conformity thereto.

Where the statute designates, by name or otherwise, the kind of action, such action shall be commenced and prosecuted in conformity to this code. Where the statute gives an action, but does not designate the kind of action, or prescribe the mode of proceeding therein, such action shall be held to be the civil action of this code, and proceeded in accordingly.

The civil code must govern where the remedy, or a portion of the remedy, is given by statute. *Pritchard v. Commissioners*, 26-588.

We never had a common-law procedure for the settlement of estates in Kansas. *McCartney v. Spencer*, 26-66.

(4549) **§ 730. Takes Effect.** This act shall take effect and be in force from and after its publication in the statute book. [Approved February 25, 1868.]

(4550) **§ 731. Certain Publications; Patent Insides.** That all legal publications heretofore made in newspapers having one side of the newspaper printed away from the office of publication, and known as patent insides or patent outsides, shall have the same force and effect as if published in newspapers wholly printed and published in such county where such publication was made. [L. 1876, ch. 98, § 1; took effect March 10, 1876.]

(4551) **§ 732. The Same.** That all publications and notices required by law to be published in newspapers in this state, if published in newspapers having one side of the paper printed away from the office of publication, known as patent outsides or insides, shall have the same force and effect as though the same were published in newspapers printed wholly and published in the county where such publication shall be made, provided one side of the paper is printed in said county where said notices are required to be published. [L. 1876, ch. 98, § 2; took effect March 10, 1876.]

JUSTICES' CIVIL CODE.

CHAPTER 81, COMPILED LAWS OF 1885.

AN ACT regulating the Jurisdiction and Procedure before Justices of the Peace in Civil Cases.

[Took effect October 31, 1868.]

ART.

1. Jurisdiction.
2. Commencement of an action.
3. Arrest and bail.
4. Attachment.
5. Replevin.
6. Bill of particulars.
7. Change of place of trial.
8. Trial.

ART.

9. Judgment.
10. Appeal.
11. Stay of execution.
12. Execution.
13. Forcible entry and detainer.
14. Constables.
15. Miscellaneous.

ARTICLE 1—JURISDICTION.

SEC.

1. Jurisdiction coextensive with county.
2. Jurisdiction in particular cases.
3. Jurisdiction as to amount.
4. The same.
5. Confession of judgment.

SEC.

6. Jurisdiction in action for trespass.
7. Action to be certified to district court when title to land in dispute; proceedings.
8. Justices have not cognizance of what actions.

Be it enacted by the Legislature of the State of Kansas:

(4552) §1. **Jurisdiction.** The jurisdiction of justices of the peace in civil cases shall be coextensive with the county wherein they may have been elected, and wherein they shall reside.

Great allowance should be made for the ignorance of justices; and if from the record can be gathered what the magistrate intended to do and decide, and there is that which, however irregularly and inartificially prepared, can be construed into an expression of that intention, the record will be upheld as a sufficient record of the intended act and decision. *Wilton Town Co. v. Humphrey*, 15-372.

A justice of the peace, under §131 of the "justices' act," may try an action in replevin only when the property is of less value than \$100. If at any stage of the proceeding it shall be ascertained that the value amounts

to that sum, although it may have been appraised at less, his jurisdiction is ousted. *Garrett v. Wood*, 3-232.

(4553) **§ 2. Jurisdiction in Particular Cases.** Under the limitations and restrictions herein provided, justices of the peace shall have original jurisdiction of civil actions: [*First*,] For the recovery of money only, and to try and determine the same where the amount claimed does not exceed three hundred dollars. *Second*, To try the action for the forcible entry and detention, or detention only, of real property. *Third*, To issue orders of attachment and proceed against the goods and effects of debtors in certain cases. *Fourth*, To issue subpoenas for witnesses, and compel their attendance in causes and matters pending before them, or other cause or matter wherein they may be required to take depositions. *Fifth*, To issue executions on judgments rendered by them. *Sixth*, To proceed against security for costs and bail for the stay of execution before them in the manner prescribed by law. *Seventh*, To proceed against constables failing to make return, making false return, or failing to pay over money collected on execution issued by any such justice. *Eighth*, To administer any oath or affirmation authorized or required by law to be administered. *Ninth*, To take the acknowledgment of deeds, mortgages, and other instruments in writing. *Tenth*, To act, in the absence of the probate judge, in the trial of contested elections of justices of the peace. *Eleventh*, To solemnize marriages. [L. 1870, ch. 88, § 1 (§ 2, as amended); took effect March 10, 1870.]

Where an action for the recovery of money only has been commenced before a justice of the peace, and is afterward appealed to the district court, the defendant has no absolute right in the district court to set up, claim and prove a set-off exceeding the amount of \$300. *Wagstaff v. Challiss*, 31-213.

Jurisdiction of justices is not limited to any summary proceeding by attachment as for a contempt, but includes any proceeding, even an ordinary action, and justice has jurisdiction of action against constable for failing to pay over money on demand collected by the constable on execution issued by the justice. *Dodge v. Kincaid*, 30-347.

Suit in replevin, value of property \$15; on appeal after trial, too late to raise question that district court had no jurisdiction of appeal from justice. Whether replevin is within prohibition regarding appeals, second clause § 132, justice act, (amended, ch. 88, L. 1870, § 10,) not decided. *Miller v. Bogart*, 19-117.

District courts also have jurisdiction in action for recovery of money only, where the amount exceeds \$100 and is less than \$300. (9-163.) *Shoemaker v. Brown*, 10-391.

A justice of the peace has no jurisdiction of a suit against a school district where the amount exceeds \$100. (G. S., § 86, ch. 92.) *Jones v. School District*, 8-362.

(4554) **§ 3. Jurisdiction, Amount \$300.** When the balance claimed to be due on any open or unsettled account, or on any bill, note or bond, shall not exceed three hundred dollars, the party by whom such balance shall be claimed may commence his action therefor, before a justice of the peace, who shall have power, and he is hereby authorized, to hear and determine the matters in controversy, without regard to the amount of the original account or contract, and he may render judgment for any balance found due, not exceeding three hundred dollars.

Suit before justice of the peace, bill of particulars \$99.13, set-off \$15.86½. After jury summoned plaintiff amended, adding items to amount of \$20, and defendant amended, adding items to amount of \$11. Before submission the plaintiff withdrew all additional items except \$5, and the defendant all his additional items. The justice was not divested of jurisdiction. *Wooster v. McKinley*, 1-317.

(4555) **§ 4. On Undertaking, \$500.** In actions founded upon an undertaking given in pursuance of law in any civil proceeding pending before a justice, such justice, or his successor in office, shall have jurisdiction thereof, where the sum due or demanded on such undertaking does not exceed five hundred dollars.

Justice of the peace cannot issue an attachment on claim not due. *Lyons v. Insley*, 32-174.

(4556) **§ 5. Confession of Judgment.** If any debtor shall appear before a justice of the peace, without process, and confess that he is indebted to another, it shall be lawful for such justice, on the application of the creditor, to render judgment on such confession against the debtor.

Filing confession of judgment under § 114, justice code. The personal presence of the defendant is not absolutely necessary in such cases, and § 5 does not apply. *Bates v. McConnell*, 32-5.

(4557) **§ 6. Trespass, \$100.** Justices shall have jurisdiction in actions for trespass on real estate, where damages demanded for such trespass shall not exceed one hundred dollars.

Action for damages against railroad company for failing to make sufficient cattle guards, is not an action for trespass. *St. L. & S. F. R. R. v. Sharp*, 27-135.

The mere filing of an affidavit and answer duly verified, setting forth that the boundaries to land are in dispute, will not oust the justice of jurisdiction. *Duncan v. Yordy*, 27-349.

Bill of particulars for firing prairie, burning hay, posts and rails and growing peach trees; action is not one of trespass, and justice has jurisdiction. *Loring v. Rockwood*, 13-178.

When a bill of particulars does not show affirmatively and clearly that the action is for trespass upon real estate, the jurisdiction will be presumed. (Action for cutting timber and framing timber for saw mill, which mill they are taking away, and timber.) *Kaub v. Mitchell*, 12-59.

(4558) **§ 7. Title of Land in Dispute.** If in any action commenced before a justice it appears to the satisfaction of the justice that the title or boundaries of land is in dispute in such action, said action shall be stayed before said justice, and said justice shall, within ten days thereafter, certify said case, and transmit all papers and process therein to the clerk of the district court of his county, and said case shall be docketed and thereafter proceeded with in the district court as if originally commenced therein. The justice before whom said action is commenced shall require of the defendant setting up said title or boundary, to set forth in his answer or bill of particulars a full and specific statement of the facts constituting his defense of said title or boundary brought in question; and the defendant shall be required to make affidavit of the truthfulness of the statements in his said answer or bill of particulars contained, and that said defense is *bona fide*, and not made for vexation or delay, but for the promotion of justice. [L. 1870, ch. 88, § 2 (§ 7, as amended); took effect March 10, 1870.]

Action for rent; defendant claimed title in himself. Justice certified case to district court for trial. *Douglass v. Geiler*, 32-500.

By the amendment of § 2, ch. 28, Laws 1870, instead of an action commenced before a justice which involved the title of land being dismissed, the justice is required to certify it for trial to the district court, as if originally commenced in that court. *Douglass v. Easter*, 32-498.

The notice to leave premises for the possession of which the action is *about to be brought*, must be served at least three days before commencement of action, and the action must be brought within a reasonable time thereafter. *Douglass v. Whitaker*, 32-381.

Action against railroad company for damages for failure to make sufficient cattle-guards, is not an action for trespass. *St. L. & S. F. R. R. v. Sharp*, 27-135.

The mere filing of an affidavit and answer duly verified, setting forth that the boundaries to land are in dispute, will not oust the justice of jurisdiction. *Duncan v. Yordy*, 27-349.

The defendant raising the question of title in dispute, cannot complain of the justice certifying the case up, although no affidavit is filed. *Bernstein v. Smith*, 10-67.

(1860.) Whenever title or boundaries to land come in dispute, in any case before a justice of the peace, either in the pleadings or in the evi-

dence, his jurisdiction ceases, and he should dismiss the case. *Burt v. Reburn*, McC.-98.

(4559) **§ 8. No Jurisdiction.** Justices shall not have cognizance of any action: *First*, To recover damages for an assault or an assault and battery; or, *Second*, In any action for slander or malicious prosecution; or, *Third*, In actions against justices of the peace or other officers, for misconduct in office, except in the cases provided for in this act; or, *Fourth*, In actions on contracts for real estate; or, *Fifth*, In actions in which the title to real estate is sought to be recovered, or may be drawn in question.

Failing to pay over money collected on execution is misconduct in office. (12-251.) *Dodge v. Kincaid*, 30-347.

ARTICLE 2—COMMENCEMENT OF AN ACTION.

SEC.

9. How action commenced.
10. When guardian necessary, how appointed.
11. The summons.
12. Service and return.

SEC.

13. Service on corporation.
14. On insurance company.
15. On foreign corporation.
16. On minor.
17. Time for appearance.

(4560) **§ 9. Action Commenced.** Actions before justices of the peace are commenced by summons, or by appearance and agreement of the parties, without summons. In the former, the action is deemed commenced upon delivery of the writ to the constable to be served, and he shall note thereon the time of receiving the same. In the latter case, the action is deemed commenced at the time of docketing the case.

Where a suit has been brought in a justice's court, against a municipal corporation existing under the act relating to cities of the second class (ch. 19, Gen. Stat. 1868), and there was no regular service of summons, but instead thereof the mayor appeared to such suit in behalf of such corporation: *Held*, That such appearance was authorized by law, and bound the city. *City N. Lawrence v. Hoysradt*, 6-170.

(4561) **§ 10. Guardian Appointed.** When a guardian to the suit is necessary, he must be appointed by the justice, as follows: *First*, If the infant be plaintiff, the appointment must be made before the summons issued, upon the application of the infant, if he be of the age of fourteen years or upwards; if under that age, upon the application of some friend. The consent, in writing, of the guardian to be appointed, and to be responsible for the costs if he fail in the action, must be filed with the justice. *Second*, If the infant be defendant, the guar-

dian must be appointed before the trial. It is the right of the infant to nominate his own guardian, if the infant be over fourteen years of age, and the proposed guardian be present and consent, in writing, to be appointed; otherwise, the justice may appoint any suitable person who gives such consent.

(4562) **§ 11. Summons.** The summons shall be dated the day it is issued, signed by the justice issuing the same, directed to a constable of the proper township (except in case a person be deputed to serve it, in which case it shall be directed to such person), must contain the name or names of the defendant or defendants, if known; if unknown, give a description of him or them, and command the officer or person serving the same to summon the defendant or defendants to appear before such justice, at his office in ——— township, at a time specified therein, and must describe the plaintiff's cause of action in such general terms as to apprise the defendant of the nature of the claim against him; and there shall be indorsed on the writ the amount for which the plaintiff will take judgment, if the defendant fail to appear. If the defendant fail to appear, judgment shall not be rendered for a larger amount and the costs.

The indorsement of the amount on the summons is a limitation only when the defendant fails to appear. *Gas Co. v. Schliefer*, 22-468.

(4563) **§ 12. Service and Return.** The summons must be returnable not more than twelve days from its date, and must, unless accompanied with an order of arrest, be served at least three days before the time of appearance, as follows: *First*, By delivering a copy of the summons, with the indorsement thereon (certified by the constable or person serving the same to be a true copy), to the defendant, or leaving the same at his usual place of residence. *Second*, An acknowledgment on the back of the summons, or the voluntary appearance of a defendant, is equivalent to service.

The service was good, except that it was made only two days before the time set for trial, while it should have been at least three days before that time. The service was merely *irregular*; it was not *no service*, or a *void service*; and a judgment rendered thereon was not void, but at most was only voidable. *Nelson v. Becker*, 14-510.

Indorsement on the summons, failing to claim interest; interest allowed where defendant appeared; not error. *Gas Co. v. Schliefer*, 22-469.

(4564) **§ 13. Service of Summons on Corporation.** A summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or, if its chief officer is not found in the

county, upon its cashier, treasurer, secretary, clerk or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof.

Service of summons on corporation insufficient in this case. It does not show that said M. was president or chairman of the board of directors, or other chief officer, cashier, treasurer, secretary, clerk or managing agent, and is not good either under § 68, ch. 80, or § 13, ch. 81. U. P. Rld. v. Pillsbury, 29-653.

Where a suit had been brought in a justice's court, against a municipal corporation existing under the act relating to cities of the second class (ch. 19, Gen. Stat. 1868), and there was no regular service of summons, but instead thereof the mayor appeared to such suit in behalf of such corporation: *Held*, That such appearance was authorized by law, and bound the city. *City N. Lawrence v. Hoysradt*. 6-170.

(4565) **§14. Service of Summons on Insurance Company.** When the defendant is an incorporated insurance company, and the action is brought in the county in which there is an agency thereof, the service may be upon the chief officer of such agency.

(4566) **§15. Summons; Foreign Corporation.** When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent.

(4567) **§16. Summons; Minor.** When the defendant is a minor, under the age of fourteen years, the service must be upon him and upon his guardian or father; or, if neither of these can be found, then upon his mother, or the person having the care and control of the infant, or with whom he lives. If neither of these can be found, or if the minor be more than fourteen years of age, service on him alone shall be sufficient. The manner of service may the same as in the case of adults.

(4568) **§17. Time for Appearance; One Hour.** The parties are entitled to one hour in which to appear, after the time mentioned in the summons for appearance, or to which the case is adjourned, but are not bound to remain longer than that time, unless both parties have appeared, and the justice, being present, is engaged in the trial of another cause. In such case the justice may postpone the time of appearance until the close of such trial.

ARTICLE 3—ARREST AND BAIL.

SEC.	SEC.
18. Causes for arrest; affidavit.	24. Defendant not to be kept in custody in case of continuance, unless, etc.
19. Order may accompany summons.	25. Counter-affidavit; defendant discharged, when.
20. Undertaking of plaintiff.	26. Issuing of order of arrest after judgment; affidavit.
21. Order shall be delivered to whom; shall state what.	27. Order to be delivered to whom; shall require what.
22. How executed.	
23. Proceedings after arrest.	

(4569) **§ 18. Arrest; Causes; Affidavit.** An order for the arrest of the defendant in a civil action shall be made by the justice of the peace before whom the same is brought, when there is filed in his office an affidavit of the plaintiff, his authorized agent or attorney, made before any person authorized by law to administer oaths, stating the nature of the plaintiff's claim, that it is just, the amount thereof, as near as may be, and showing one or more of the following particulars: *First*, That the defendant has removed or begun to remove any of his property out of the county, with intent to defraud his creditors. *Second*, That the defendant has begun to convert his property, or any part thereof, into money, for the purpose of defrauding his creditors. *Third*, That he has property or rights in action which he fraudulently conceals. *Fourth*, That he has assigned, removed or disposed of, or has begun to assign, remove or dispose of his property, or any part thereof, with intent to defraud his creditors. *Fifth*, That the defendant fraudulently contracted the debt or incurred the obligation for which suit is about to be brought. *Sixth*, That the defendant is about to abscond, with intent to defraud his creditors. The affidavit shall also contain a statement of the facts claimed to justify the belief in the existence of one or more of the above particulars.

Agent or attorney may make affidavit for arrest. *Baker v. Knickerbocker*, 25-290.

This section requires that the affidavit shall contain a statement of the facts claimed to justify the belief in the existence of one or more of the grounds for the order of arrest. *Hauss v. Kohlar*, 25-643; *Gillett v. Thiebold*, 9-427.

(4570) **§ 19. Order Accompany Summons.** The order of arrest may be made to accompany the summons, or at any time afterwards before judgment.

(4571) **§ 20. Arrest; Bond.** The order of arrest shall not be issued by a justice of the peace until there has been exe-

cuted, by one or more sufficient sureties of the plaintiff, a written undertaking, to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of the arrest, if the order be wrongfully obtained, not exceeding double the amount of the plaintiff's claim, stated in the affidavit.

(4572) **§ 21. Order; Requirements.** The order of arrest shall be addressed and delivered, with a copy of the affidavit, to a constable of the proper township; it shall state the names of the parties, the amount of the plaintiff's claim specified in the affidavit, be signed by the justice of the peace issuing it, and shall require the constable to arrest the defendant and bring him forthwith before said justice.

(4573) **§ 22. Arrest; How Executed.** The officer receiving said order shall execute the same by forthwith arresting the defendant and delivering to him a copy thereof, and of the affidavit; and the defendant so arrested, unless the claim of the plaintiff, specified in the affidavit, and costs of suit, are paid, or unless discharged from custody by order of the plaintiff, shall be taken by such constable, forthwith, before the justice of the peace by whom said order of arrest was issued, and kept in custody until discharged by law.

(4574) **§ 23. Proceedings After.** Upon the return of said order of arrest, executed in pursuance of the preceding section, the trial of said cause shall proceed, unless for good cause shown, upon the application of either party, or at the instance of the justice himself, the same shall be continued, as is provided for in other cases before justices of the peace; and when the trial of said cause is continued for any period, the defendant, upon executing, with one or more sufficient sureties, a written undertaking to the effect that if judgment be rendered against him upon the final determination of the action, he will render himself amenable to the process thereon; or upon depositing in the hands of the justice of the peace the amount of money mentioned in the order of arrest, and the probable amount of cost of suit, shall be forthwith discharged from custody.

(4575) **§ 24. Continuance; Custody.** In no case shall the defendant be detained in the custody of the officer, when a continuance has been for a period of more than forty-eight hours, unless said continuance has been made at the instance, or with the consent, of the defendant himself.

(4576) **§ 25. Grounds of Arrest; Counter-Affidavit.** If

the defendant, before the commencement of the trial, file his affidavit with the justice, denying the grounds laid in the affidavit of the plaintiff for the arrest, the truth of such grounds shall be considered in issue on the trial, and shall be tried at the same time and in the same manner as the other issues in the case; but a separate finding shall be made whether such grounds are "true" or "not sustained by the evidence." If all the grounds are found to be not sustained by the evidence, the defendant shall be discharged.

Counter-affidavit filed, and defendant discharged on account of technical defect in the proceedings. Judgment entered on the note, and proceedings affirmed in district court on error, and reversed by supreme court, and in meantime abstract of judgment entered in the district court. Execution against the person should not be awarded till the issue made by the counter-affidavit has been first tried. *Howe Machine Co. v. Lincoln*, 25-312.

Return of constable, made on copy of order of arrest, but it did not have the name of the justice on it. The mistake in giving the wrong paper to the defendant did not vitiate the proceedings, and any mistake was waived by the action of the defendant. *Howe Machine Co. v. Lincoln*, 24-125.

(4577) **§ 26. Arrest After Judgment.** On judgment against the defendant, in any civil action before a justice of the peace, when the defendant is in the custody of the officer, as hereinbefore provided, or if, after judgment against him, there is filed, in the office of such justice, an affidavit of the plaintiff, his authorized agent or attorney, made before any person competent to administer an oath, stating the amount of judgment remaining unpaid, and one or more of the particulars mentioned in section eighteen, said justice of the peace shall, unless otherwise ordered by the plaintiff, issue an execution, and accompany the same with an order for the arrest of the defendant.

Execution against the person should not be awarded till the issue made in the counter-affidavit has been first tried. *Howe Machine Co. v. Lincoln*, 25-312.

(4578) **§ 27. Order of Arrest; How Executed.** Said order of arrest shall be addressed and delivered, with a copy of the affidavit, to the constable having said execution, and shall state the names of the parties, be signed by the justice issuing it, and state the amount of the judgment and costs unpaid, and shall require the officer, in case the same shall not be paid, or an amount of property of the defendant, whereon to levy execution, sufficient to satisfy the same cannot be found in his county, to arrest the defendant, if not already in the custody of the officer, and deliver him to the sheriff of the proper

county, to be committed by him to the jail of the county, and kept in custody until discharged by law.

ARTICLE 4—ATTACHMENT.

SEC.

28. Affidavit for attachment; attachment when defendant is a foreign corporation or non-resident.
29. Undertaking to be given.
30. The issuing, delivery and command of attachment.
31. Return day.
32. How attachments executed.
33. How property discharged from attachment.
34. Inventory when two or more attachments; priority of liens.
35. How orders served when accompanied with summons; proceedings if summons cannot be served.
36. Perishable property to be sold, when; how money realized disposed of.
37. Proceedings against garnishee.
38. Copy of order and notice, how served.
39. Examination of garnishee.
40. Money due defendant may be paid into court.
41. Attachment for garnishee.
42. Property or money in hands of garnishee, how disposed of.
43. Plaintiff may proceed against garnishee, when.

SEC.

44. Trial of truth of answer of garnishee may be demanded, when.
45. When judgment shall be rendered.
46. Attachment discharged upon judgment for defendant.
47. Judgment, how satisfied.
48. Order to re-seize property.
49. Who to determine priorities.
50. Officer's return.
51. Garnishee liable to plaintiff.
52. When defendant may retain property.
53. Duty of justice when counter-affidavit filed.
54. Proceedings to be certified to district court where there are lands but no goods, etc.
- 54a. Attachment or garnishment at the commencement of the action; affidavit, summons, etc.
- 54b. The summons, directions and contents.
- 54c. Proceedings in garnishment.
- 54d. Publication of summons, when made.

(4579) § 28. **Affidavit, and Grounds For.** The plaintiff in a civil action [*before a justice of the peace*] for the recovery of money may, at or after the commencement thereof [*when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing the nature of the plaintiff's claim, that it is just, the amount which the affiant believes the plaintiff ought to recover, and the existence of some one or more of the following particulars,*]* have an attachment against the property of the defendant, and upon the grounds herein stated: *First*, When the defendant or one of several defendants is a foreign corporation or a non-resident of this state (but no attachment shall be granted on the ground

* "The words in *italics* and in brackets were accidentally omitted. This section should be reenacted as here printed."

The foregoing note appears in the Session Laws of 1870, and the above section appears in this work as there printed.

or grounds in this clause stated, for any claim other than a debt or demand arising upon contract, judgment or decree, unless the cause of action arose wholly within the limits of this state, which fact must be established on the trial); or, *Second*, When the defendant or one of several defendants has absconded with intent to defraud his creditors; or, *Third*, Has left the county of his residence to avoid the service of a summons; or, *Fourth*, So conceals himself that a summons cannot be served upon him; or, *Fifth*, Is about to remove his property, or a part thereof, out of the jurisdiction of the court, with the intent to defraud his creditors; or, *Sixth*, Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or, *Seventh*, Has property or rights in action which he conceals; or, *Eighth*, Has assigned, removed or disposed of, or is about to dispose of his property, or a part thereof, with the intent to defraud, hinder or delay his creditors; or, *Ninth*, Fraudulently contracted the debt, or fraudulently incurred the liability or obligation, for which suit is about to be or has been brought; or, *Tenth*, Where the damages for which the action is brought are for injuries arising from the commission of some felony or misdemeanor; or, *Eleventh*, When the debtor has failed to pay the price or value of the article or thing delivered, which by contract he was bound to pay upon delivery. [L. 1870, ch. 88, § 3 (§ 28, as amended); took effect March 10, 1870.]

Justice issuing attachment on debt before due. A claim that the justice did not have jurisdiction to issue the order of attachment, or that he wrongfully issued the same, is hardly sufficient to render the justice liable. *Connelly v. Woods*, 31-363.

Where, upon a motion to discharge an attachment, affidavits are read and oral evidence is submitted tending to prove all the facts necessary to sustain the attachment, and thereupon the court refuses to grant such a motion, a reviewing court will not disturb such ruling. *Urquhart v. Smith*, 5-447.

Decision by justice on motion to discharge attachment because property is exempt, is not conclusive. *Watson v. Jackson*, 24-442.

Agent or attorney may make affidavit in attachment. *Baker v. Knickerbocker*, 25-290.

Generally, in our codes of procedure, the word "defendant" is a collective name which includes all the separate defendants; and it is probably so used in §§ 28 and 53 of the justices' code; but the word "defendants" is also used in said § 28 in a very different sense, evidently meaning the defendants severally. Said section says: "When the defendant, or one of several defendants," etc., the word "defendant" evidently meaning the sole defendant when there is only one defendant, and all when there are several de-

defendants; while the word "defendants," used in the same section, evidently means each of the defendants severally. *Williams v. Muthersbaugh*, 29-734.

Before justice can issue order of attachment, (1) an action must be commenced at the time or before the order of attachment is issued; (2) an affidavit for the attachment must be filed; (3) an attachment bond or undertaking must be given. *Connelly v. Woods*, 31-363.

(4580) **§ 29. Attachment Bond.** The order of attachment shall not be issued by the justice until there has been executed in his office, by one or more sufficient sureties of the plaintiff, to be approved by the justice, an undertaking, not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained.

(4581) **§ 30. Order.** The order of attachment may be made to accompany the summons, or at any time afterward before judgment; it shall be addressed and delivered to any constable of the proper township, and shall require him to attach the goods, chattels, stocks or interest in stocks, rights, credits, moneys and effects of the defendant in his county, not exempt by law from being applied to the payment of the plaintiff's claim, or so much thereof as will satisfy the plaintiff's claim, to be stated in the order as in the affidavit, and the probable costs of the action, not exceeding fifty dollars.

Justice cannot issue order of attachment on claim not yet due. *Connelly v. Woods*, 31-363.

(4582) **§ 31. Return Day.** The return day of the order of attachment, when issued at the commencement of the action, shall be the same as that of the summons; when issued afterwards, it shall be executed and returned forthwith.

(4583) **§ 32. Attachments Executed.** When there are several orders of attachment against the same defendant, in the hands of the same officer, they shall be executed in the order in which they were received by said officer. He shall go to the place where the defendant's property may be found, and there, in the presence of two creditable persons, declare that by virtue of said order, he attaches said property at the suit of such plaintiff; and the officer, with two householders of the county, who shall be first sworn or affirmed by the officer, shall make a true inventory and appraisalment of all property attached, which shall be signed by the officer and said householders, and returned with the order; when the property can be come at, he shall take the same into his custody, and hold it subject to the order of the justice.

(4584) **§ 33. Property Discharged; Forthcoming Bond.** The constable shall deliver the property attached to the person in whose possession it was found, upon the execution by such person, in the presence of the constable, of an undertaking to the plaintiff, with one or more sufficient sureties, resident in the county, to the effect that the parties to the same are bound in double the appraised value thereof, that the property or its appraised value in money shall be forthcoming to answer the judgment of the court in the action; but if it shall appear to the court that any part of said property has been lost or destroyed by unavoidable accident, the value thereof shall be remitted to the person or persons so found.

When an order of attachment against property of A. is levied upon personal property in possession of B., and B. thereafter procures the execution of a forthcoming bond by C., and the property is then returned to possession of B.: *Held*, That such bond is in law the obligation of B., and that both B. and his surety C. are thereafter estopped to deny that the property so attached and bonded was the property of A. *Wolf v. Hahn*, 28-588.

The law makes a distinction between a release of the property from attachment, and the return thereof to the owner. That the property was sold upon a certain execution, and the plaintiff in error was interested in such execution, does not change the rule. This action was on the bond. The sole object for giving the bond failed, as the property was not restored; therefore, no recovery can be had upon it. (11-167.) *Eddy v. Moore*, 23-114.

Undertaking to release attached property, bond stating "to the plaintiff, in the sum of \$85, that the defendant shall perform the judgment of the said magistrate in this action touching the attachment herein;" these last words are surplusage, and do not vitiate the bond. *Endress v. Ent*, 18-236.

All the parties on attachment bond may be sued without issuing execution against the principal. *Endress v. Ent*, 18-236.

(4585) **§ 34. Inventory; Priority.** Different attachments of the same property may be made, and one inventory and appraisalment shall be sufficient. The lien of the attachments shall be in the order in which they are served, and the subsequent attachments shall be served on the property as in the hands of the officer, and subject to the prior attachments. The justice who issued the attachment having the priority of lien, shall determine all questions as to the priority of liens on the property attached.

(4586) **§ 35. Service of Order; Publication.** If the order of attachment is made to accompany the summons, a copy thereof and the summons shall be served upon the defendant in the usual manner for the service of summons, if the same can be done within the county: and when any property of the

defendant has been taken under the order of attachment, and it shall appear that the summons issued in the action has not been and cannot be served on the defendant in the county, in the manner prescribed by law, the justice of the peace shall continue the cause for a period not less than thirty or more than fifty days; whereupon the plaintiff shall proceed, for three consecutive weeks, to publish, in some newspaper printed in the county, or, if none be printed therein, then in some newspaper of general circulation in said county, a notice, stating the names of the parties, the time when, by what justice of the peace, and for what sum said order was issued and the time when the cause will be heard, and shall make proof of such publication to the justice; and thereupon said action shall be proceeded with the same as if said summons had been duly served.

In an attachment case before justice, against a non-resident defendant, the continuance for service by publication must by statute be "for a period not less than 30 nor more than 50 days." *Held*, That the statutory rule of computing time obtains, and that the day of continuance must be excluded, but the day of trial included. *Warner v. Bucher*, 24-478.

(4587) **§ 36. Perishable Property.** When the cause is continued, as provided for in the preceding section, and it shall appear that any of the property taken under the attachment is live stock, or is of a perishable nature, the justice may issue his order directing the officer having custody thereof, to dispose of the same as upon execution; and the moneys realized therefrom shall be paid over to the justice, and applied as other money realized from the sale of the property attached is applied.

(4588) **§ 37. Against Garnishee.** When the plaintiff, his agent or attorney, shall make oath, in writing, that he has good reason to and does believe that any person or corporation, to be named, and within the county where the action is brought, has property of the defendant (describing the same), or credits in his possession, or is indebted to him, if the officer cannot come at the property, he shall leave with such garnishee a copy of the order of attachment, with a written notice that he appear before the justice, at the return of the order of attachment and answer, as provided in section thirty-nine: *Provided*, That when the garnishee is a corporation, the answer day for such garnishee shall in no case be less than ten days from the day of service of the written notice aforesaid; and if the office or place of business of the president or other head of said corporation, or of the secretary, cashier, or managing

agent thereof, is not held or kept in the county where the action is pending, the answer day for such garnishee shall not be less than twenty days from the day of service of written notice as aforesaid. [L. 1870, ch. 88, § 4 (§ 37, as amended); took effect March 10, 1870.]

Agent or attorney may make affidavit. *Baker v. Knickerbocker*, 25-290.

The garnishment proceedings in this case were brought under ch. 163, Laws 1872. The first section of that chapter provides for issuing a summons in garnishment, and this section corresponds with § 37 of the justices' code. *Seymour v. Cooper*, 26-544.

Garnishee proceedings reach only to those debts which, whether due or not, are owing by the garnishee to the debtor at the time of the service of the garnishee process. *Phelps v. A. T. & S. F. R. R.*, 28-165.

(4589) **§ 38. Service of.** The copy of the order and notice shall be served upon the garnishee as follows: If he be a person, they shall be served upon him personally, or left at his usual place of residence; if a corporation, they shall be left with the president or other head of the same, or the secretary, cashier or managing agent thereof.

(4590) **§ 39. Examination; Garnishee.** The garnishee shall appear before the justice, in accordance with the command of the notice, and shall answer, under oath, all questions put to him touching the property of every description and credits of the defendant, in his possession or under his control; and he shall disclose truly the amount owing by him to the defendant, whether due or not; and in the case of a corporation, any stock therein held by or for the benefit of the defendant, at or after the service of the notice. The examination of the garnishee, with the questions and answers, shall be reduced to writing by the justice, or in his presence signed by the party and filed, unless the parties otherwise agree.

Garnishment proceedings are provided for and prescribed by §§ 39 to 54 of the justices' code. *Seymour v. Cooper*, 26-544.

In general, the personal earnings of a debtor for three months next preceding the issuing of any process against him for the collection of debt, whether such process is issued before or after judgment, so far as such earnings are necessary for the support of the debtor's family, are exempt. Defendant's mother and sister constitute a family in this case. *Seymour v. Cooper*, 26-544.

Garnishee proceedings reach only to those debts which, whether due or not, are owing by the garnishee to the debtor at the time of the service of the garnishee process, and new contracts made thereafter are not affected thereby. *Phelps v. A. T. & S. F. R. R.*, 28-165.

(4591) **§ 40. Money Paid into Court.** A garnishee may

pay the money owing to the defendant by him, to the constable having the order of attachment, or into court. He shall be discharged from liability to the defendant for any money so paid, not exceeding the plaintiff's claim. He shall not be subject to costs beyond those caused by his resistance of the claim against him, and if he disclose the property in his hands, or the true amount owing by him, and deliver or pay the same according to the order of the court, he shall be allowed his costs.

(4592) **§ 41. Attachment; Contempt.** If the garnishee do not appear and answer, as required by section thirty-nine, the justice may proceed against him by attachment, as for a contempt.

(4593) **§ 42. Disposition of Property or Money.** If the garnishee appear and answer, and it is discovered on his examination that at or after the service of the order of attachment and notice upon him, he was possessed of any property of the defendant, or was indebted to him, the justice may order the delivery of such property, and the payment of the amount owing by the garnishee into court, or may permit the garnishee to retain the property or the amount owing, upon the execution of an undertaking to the plaintiff, by one or more sufficient sureties, to the effect that the amount shall be paid or the property forthcoming, as the court may direct.

Garnishee proceedings reach only to those debts which, whether due or not, are owing by the garnishee to the debtor at the time of the service of the garnishee process, and new contracts made thereafter are not affected thereby. *Phelps v. A. T. & S. F. R. R.*, 28-165.

Three months' earnings, necessary to support debtor's family, are exempt. *Seymour v. Cooper*, 20-544. (See amendment to exemption law, acts 1886.)

The judgment in a trial under § 44, if against the garnishee, is rendered in accordance with § 42 of the justices' code; and if in favor of the garnishee, it is rendered merely for costs, and a judgment under said §§ 44 and 42 is not a final determination as to the liability or non-liability of the garnishee to the alleged debtor, the defendant in the main action. *Board v. Scoville*, 13-32; *Fitch v. Fire Ins. Co.*, 23-366.

(4594) **§ 43. Plaintiff Proceed against Garnishee.** If the garnishee fails to appear and answer, or if he appears and answers, and his disclosure is not satisfactory to the plaintiff, or if he fails to comply with the order of the justice to deliver the property and pay the money owing into court, or give the undertaking required in the preceding section, the plaintiff may proceed against him in an action, in his own name, as in

other cases; and thereupon such proceedings may be had as in other actions, and judgment may be rendered in favor of the plaintiff for the amount of the property and credits of every kind, of the defendant in the possession of the garnishee, and for what shall appear to be owing by him to the defendant, and for the costs of the proceedings against the garnishee. If the plaintiff proceed against the garnishee by action, for the cause that his disclosure was unsatisfactory, unless it appears in the action that such disclosure was incomplete, the plaintiff shall pay the costs of such action. The judgment in this action may be enforced as judgments in other cases. When the claims of the plaintiffs in attachment are satisfied by the garnishee, he may, on motion, be substituted as the plaintiff in the judgment.

(4595) **§ 44. Truth of Answer.** The plaintiff may give notice to the justice that the answer of the garnishee is unsatisfactory, and demand a trial of the truth of such answer, and the justice shall thereupon appoint a day for such trial, which shall be conducted, in all respects, as in other cases.

In a trial under § 44, to try the truth of the answer of a garnishee, no pleadings are required other than the affidavit for garnishment, the answer of the garnishee, and the notice that the answer is unsatisfactory. *Fitch v. Ins. Co.*, 23-366.

(4596) **§ 45. When Judgment Rendered.** Final judgment shall not be rendered against the garnishee until the action against the defendant in attachment has been determined; and if, in such action, judgment be rendered for the defendant in attachment, the garnishee shall be discharged, and recover costs. If the plaintiff shall recover against the defendant in attachment, and the garnishee shall deliver up all property, moneys and credits of the defendant in his possession, and pay all the moneys from him due, as the court may order, the garnishee shall be discharged, and the costs of the proceedings against him shall be paid out of the property and moneys so surrendered, or as the court may think right and proper.

(4597) **§ 46. Discharge.** If judgment be rendered, in the action, for the defendant, the attachment shall be discharged, and the property attached, or its proceeds, shall be returned to him.

(4598) **§ 47. Judgment, how Satisfied.** If judgment be rendered for the plaintiff, it shall be satisfied as follows: So much of the property remaining in the hands of the officers, after applying the moneys arising from the sale of perishable

property, and so much of the personal property, if any, as may be necessary to satisfy the judgment, shall be sold, by order of the justice, under the same restrictions and regulations as if the same had been levied on by execution; and the money arising therefrom, with the amount which may be recovered from the garnishee, shall be applied to satisfy the judgment and costs. If there be not enough to satisfy the same, the judgment shall stand, and execution may issue thereon for the residue, in all respects as in other cases. Any surplus of the attached property, or its proceeds, shall be returned to the defendant.

(4599) **§ 48. Order to Re-Seize.** The justice may order the constable to repossess himself, for the purpose of selling it, of any of the attached property which may have passed out of his hands without having been sold or converted into money; and the constable shall, under such order, have the same power to take the property as he would have under an order of attachment.

(4600) **§ 49. Priorities.** Where several attachments are executed on the same property, or the same persons are made garnishees, the justice issuing the first order served, on the motion of any of the plaintiffs, may determine the amounts and priorities of the several attachments, and the proceeds shall be applied accordingly.

(4601) **§ 50. Officer's Return.** The officer shall return, upon every order of attachment, what he has done under it. The return must show the property attached, and the time it was attached. When garnishees are served, their names, and the time each was served, must be stated. The officer shall also return, with the order, all undertakings given under it.

(4602) **§ 51. Garnishee Liable.** An order of attachment binds the property attached from the time of service, and the garnishee shall stand liable to the plaintiff in attachment for all property, moneys and credits in his hands, or due from him to the defendant, from the time he is served with the written notice mentioned in section thirty-seven; but when property is attached in the hands of a consignee or other person having a prior lien, his lien thereon shall not be affected by the attachment.

Garnishee proceedings reach only to those debts which, whether due or not, are owing by the garnishee to the debtor at the time of the service of the garnishee process, and new contracts made thereafter are not affected thereby. *Phelps v. A. T. & S. F. R. R.*, 28-165.

The judgment under §§ 42 and 44 is not a final determination as to the

liability or non-liability of the garnishee to the alleged debtor, the defendant in the main action. *Board v. Scoville*, 13-32; *Fitch v. Ins. Co.*, 23-366.

(4603) **§ 52. Bond Discharging Attachment.** If the defendant, or other person in his behalf, at any time before judgment, cause an undertaking to be executed to the plaintiff, by one or more sureties, resident in the county, to be approved by the justice, in double the amount of the plaintiff's claim, to be stated in his affidavit, to the effect that the defendant shall perform the judgment of the justice, the attachment in such action shall be discharged, and restitution made of any property taken under it, or the proceeds thereof. Such undertaking shall also discharge the liability of a garnishee, in such action, for any property of the defendant in his hands.

The law makes a distinction between a release of the property from attachment and the return thereof to the owner. That the property was sold upon a certain execution, and the plaintiff in error was interested in such execution, does not change the rule. This action was on the bond. The sole object for giving the bond failed, as the property was not restored; therefore, no recovery can be had upon it. (11-167.) *Eddy v. Moore*, 23-114.

Undertaking to release attachment "to the plaintiff, in the sum of \$85, that the defendant shall perform the judgment of the said magistrate in this action *touching the attachment herein*;" these last words are surplusage, and do not affect the bond. *Endress v. Ent*, 18-237.

Appeal of the case by the defendant discharges the attachment, and district court rightfully refused to hear motion for discharge. *St. J. & D. C. R. R. v. Casey*, 14-504.

(4604) **§ 53. Counter-Affidavit Filed.** If the defendant shall, before the trial is commenced, file an affidavit, denying the grounds laid for the attachment in the plaintiff's affidavit, the justice shall, on reasonable notice, in writing, being given to the opposite party, proceed to examine into the truth of the grounds laid for such attachment, and shall hear such evidence as may be produced by either party; and if it appear that such grounds are not sustained by the evidence, the justice shall discharge the attachment.

But under our statutes we think it is clear beyond all question, that an attachment will not only lie against a partnership, but will also lie against any member thereof for a partnership debt. It will lie against a partnership, however, only where all the members thereof have by their acts rendered themselves liable to an attachment. Each partner, however, is responsible for his own acts; and where one of the partners has rendered himself liable to an attachment, the attachment may not only be issued against him, but partnership property may be taken by attachment as a security for the debt. (25-166; 5-376.) *Williams v. Muthersbaugh*, 29-734.

The decision on motion to discharge because exempt property is seized, is not conclusive. *Watson v. Jackson*, 24-442.

Ordinary appeal bond by plaintiff, after judgment in his favor and attachment dissolved, which does not refer to the attachment, does not take the question of attachment to the district court. District court may refuse to permit the same to be amended. *Gates v. Sanders*, 13-411.

(4605) **§ 54. Certified to District Court; Real Estate.** If, in any case where an order of attachment has been issued by a justice of the peace, it shall appear from the return of the officer and from the examination of the garnishee, that no property, moneys, rights, credits or effects of the defendant has been taken under the attachment, but that the defendant is the owner of an interest in real estate in the county, the justice before whom such action is pending shall, at the request of the plaintiff, forthwith certify his proceedings to the district court of the proper county; and thereupon the clerk of said court shall docket said cause, and the action shall be proceeded with in said court in all respects as if the same had originated therein.

Cited, but not passed on. *Seymour v. Cooper*, 26-544.

(4606) **§ 54a. Garnishment at Commencement of Action.** That in all personal actions arising upon contract before justices of the peace, if the plaintiff, his agent or attorney, shall file with the justice, at the time of or after the commencement of the suit, an affidavit stating that he has good reason to believe, and does believe, that any person or corporation to be named, and within the county where the action is brought, has property, money, goods, chattels, credits and effects in his hands, or under his contract [control], belonging to the defendant, or that such person or corporation is anywise indebted to the principal defendant, whether such indebtedness be due or not, that the principal defendant (naming him) is justly indebted to the plaintiff in a given amount over and above all legal set-off, and that the plaintiff has good reason to and does believe that he will lose the same unless a garnishee summons issue to the aforesaid person, a garnishee summons shall be issued and personally served, in the same manner as an ordinary summons, and from the time of such service the garnishee shall stand liable to the plaintiff for all property, money and articles in his hands or due from him to the defendant. [L. 1872, ch. 163, § 1; took effect March 21, 1872.]

Three months' personal earnings necessary for the support of the defendant's family are exempt. *Seymour v. Cooper*, 26-543.

Attorney or agent may make affidavit. *Baker v. Knickerbocker*, 25-290.

(4607) § **54b. Order; Service, etc.** Said garnishee summons shall be directed to the proper officer, reciting the commencement of suit against the principal defendant and the filing of the affidavit, and thereupon commanding said officer to warn and summons such person to appear before said justice, on a day named, not more than twenty days from the date of issuing the same, to make disclosure under his oath, to be filed with the said justice, touching his liability as garnishee of the principal defendant (naming him) as charged in said affidavit, and thenceforth to pay no money and deliver no property to the defendant (naming him), and of said writ to make due return. [L. 1872, ch. 163, § 2; took effect March 21, 1872.]

(4608) § **54c. Proceedings.** The garnishee shall appear before the justice in accordance with the commands of said summons, and the same proceedings shall thereafter be had in case of the appearance or default of said garnishee, as near as may be, and with like effect as in proceedings against a garnishee in attachment before justice of the peace. [L. 1872, ch. 163, § 3; took effect March 21, 1872.]

(4609) § **54d. Publication; Continuance.** That when under proceedings to which this act is supplemental, it shall appear to the justice from the answers of the garnishee that he has property, moneys, credits, chattels or effects in his hands, or under his control, belonging to the defendant, or that the garnishee is anywise indebted to the defendant, and that the summons issued in the action has not been and cannot be served on the defendant in the county in the manner prescribed by law, the justice shall continue the cause for a period of not less than thirty nor more than fifty days, and thereupon service may be made by publication in the same manner and with like effect as is prescribed by law in proceedings in attachment before justices of the peace. [L. 1879, ch. 129, § 1; took effect March 15, 1879.]

ARTICLE 5—REPLEVIN.

SEC.

55. Jurisdiction of justice.
56. Affidavit.
57. Undertaking to be executed.
58. Summons; its command.
59. How writ executed.
60. Defendant may have return of property, when.
61. Plaintiff may except to sureties.

SEC.

62. Affidavit of plaintiff to fix jurisdiction as to amount; value of property.
63. Proceedings when plaintiff fails to prosecute action to final judgment.
64. Findings of jury.
65. Judgment for return of property, and for damages.
66. Damages to plaintiff; judgment against defendant.

SEC.

67. Action may proceed for damages only.

68. Constable may break open buildings, when.

SEC.

69. Defendant who conceals property, may be committed.

70. Penalty for issuing writ without affidavit.

(4610) **§ 55. Jurisdiction; Replevin; \$100.** Justices of the peace shall have jurisdiction of actions for the recovery of specific personal property not exceeding one hundred dollars in value, as herein provided. [L. 1870, ch. 88, § 5, (§ 55, as amended); took effect March 10, 1870.]

A justice of the peace has jurisdiction in all actions of replevin where the property in controversy does not exceed \$100 in value. *Griffiths v. Wheeler*, 31-25.

No demand is necessary when a person, without the consent of the owner, obtains possession of personal property, and then, without any right which the law will recognize, asserts a claim to the property inconsistent with the owner's right of property and possession. *Shoemaker v. Simpson*, 16-43.

It is only when the value exceeds one hundred dollars that the proceedings were to be certified to the district court. In replevin cases, the jurisdiction of a justice is placed at less than \$100. *Leslie v. Reber*, 4-315.

(*Code 1859, § 131.*) A justice of the peace, under § 131, may try an action in replevin only when the property is of less value than \$100. When the record shows a judgment was rendered for the sum of \$95, the value of the property, or the return thereof, and also \$20 damages, and for costs of said suit, taxed at \$15: *Held*, That this is not a judgment for \$115, and is, though not very formally correct, substantially the judgment required by the statute, and is not void. *Garrett v. Wood*, 3-232.

(4611) **§ 56. Replevin Affidavit.** An action for this purpose shall not be brought until there is filed in the office of the justice an affidavit of the plaintiff, his agent or attorney, showing: *First*, A description of the property claimed; *Second*, That the plaintiff is the owner thereof, or has a special ownership therein, stating the facts in relation thereto, and that he is entitled to the immediate possession of the property; *Third*, That the property is wrongfully detained by the defendant; *Fourth*, That it was not taken in execution on any order or judgment against said plaintiff, or if so taken on execution, that it is by statute exempt from seizure, or for the payment of any tax, fine or amercement assessed against him, or by virtue of an order of delivery issued under this article, or any other mesne or final process issued against said plaintiff; and, *Fifth*, The actual value of the property. When several articles are claimed, the value of each article shall be stated as nearly as practicable.

Attorney or agent may make affidavit. *Baker v. Knickerbocker*, 25-290.

The decision of the justice on the motion to discharge the attachment because the property is exempt, is not conclusive. *Watson v. Jackson*, 24-442.

It may be that an action for the recovery of specific personal property cannot be maintained before a justice without having an order for delivery. The action shall not be brought until the affidavit is filed, and no summons shall issue until bond is given. *Batchelor v. Walburn*, 23-737.

Whether the action of replevin is within the prohibition regarding appeals, found in the second clause of § 132, justice act, (amended, § 10, ch. 88, L. 1870,) not decided. Suit to recover personalty, value, \$15; trial and appeal. After trial in district court, it is too late to move to dismiss appeal. *Miller v. Bogart*, 19-117.

(4612) § 57. **Replevin Bond.** The justice shall not issue a summons as hereinafter provided, until there has been executed in his office, by one or more sufficient sureties of the plaintiff, to be approved by the justice, an undertaking in not less than double the value of the property, as stated in the affidavit, to the effect that the plaintiff shall duly prosecute the action, and pay all costs and damages which may be awarded against him, and if the property be delivered to him that he will return the same to the defendant, if a return thereof be adjudged.

No summons can issue till affidavit filed and bond given. *Hannum v. Norris*, 21-116; *Batchelor v. Walburn*, 23-737.

And justice is liable if writ wrongfully issued. *Hannum v. Norris*, 21-116.

(4613) § 58. **Summons.** Upon such affidavit and undertaking being executed and filed with the justice, he shall issue a summons as in other cases, but in addition commanding the constable immediately to seize and take into his custody, wherever they may be found in the county, the goods and chattels mentioned in the affidavit, and deliver the same to the plaintiff.

Affidavit stating "*mesne of final process*," and not stating that the property was not taken in execution on any order or judgment against him, or if so taken on execution, that it was by statute exempt from seizure; nor does he state that it was not taken on "any other *mesne or final process* issued against him." The affidavit was not void, and the court had jurisdiction to hear and determine the case. *Williams v. Gardner*, 22-122.

Justice is liable if writ wrongfully issue. *Hannum v. Norris*, 21-116.

(4614) § 59. **Writ Executed.** The constable shall execute the writ by taking the property therein mentioned. He shall also deliver a copy of the summons to the persons charged with the unlawful detention of property, or leave such a copy at his usual place of residence, and shall make return of the

time and manner of service, and any undertaking taken by him.

(4615) **§ 60. Return of Property; Delivery Bond.** If, within twenty-four hours after service of the copy of the summons, there is executed, by one or more sufficient sureties of the defendant, to be approved by the constable, an undertaking to the plaintiff, in not less than double the amount of the value of the property, as stated in the affidavit of the plaintiff, to the effect that the defendant will deliver the property to the plaintiff if such delivery be adjudged, and will pay all costs and damages that may be awarded against him, the constable shall return the property to the defendant. If such undertaking be not given within twenty-four hours after the service of the order, the constable shall deliver the property to the plaintiff.

(4616) **§ 61. Justification of Sureties.** The plaintiff may, within twenty-four hours from the time the undertaking mentioned in the preceding section is given by the defendant, give notice to the constable that he excepts to the sufficiency of the sureties. If he fails to do so, he must be deemed to have waived all objections to them. When the plaintiff excepts, the sureties must justify, upon notice, as bail on arrest. The constable shall be responsible for the sufficiency of the sureties until the objection to them is waived, as above provided, or until they justify.

(4617) **§ 62. Affidavit as to Value, etc.** The affidavit of the plaintiff, as to the value of the property, shall fix the jurisdiction of the justice so far as such value is concerned; but the value of the property shall not be assessed against the defendant at a greater amount than that sworn to by the plaintiff in his affidavit.

And the justice may render judgment for the full value of the property, "in case a return (of the property) cannot be had, and for damages for withholding said property, and the costs of suit." *Griffiths v. Wheeler*, 31-25.

In action of replevin before justice, it is error to assess the value of the property against the defendant at a greater amount than that sworn to by plaintiff in his affidavit. *Jaquith v. Davidson*, 21-341; *Griffiths v. Wheeler*, 31-25.

(4618) **§ 63. Failure to Prosecute.** If the property has been delivered to plaintiff, and he fails to prosecute his action to final judgment, the justice shall, upon the application of the defendant or his attorney, impanel a jury to inquire into the right of property, and the right of possession of the defendant to the property taken. If the jury shall be satisfied that the

said property was the property of the defendant at the commencement of the action, or if the said jury be satisfied that the defendant was entitled to the possession at such time, they shall find accordingly, and shall further find the value of such property, or the value of the possession thereof, and any damages for withholding the same as may be just and proper.

(4619) **§ 64. Findings.** In all cases when the property has been delivered to the plaintiff, when the jury shall find for the defendant, they shall also find whether the defendant had the right of property, or the right of possession only, at the commencement of the suit, and, if they find either in his favor, they shall also find the value of the property, or the value of the possession, and such damages for withholding such property as may be just and proper.

Under the justice's act, it is the duty of the jury finding for the defendant, to find whether he had the right of property, or right of possession only, and also the value of the property and of the possession. We do not think this section controls on appeals. *Copeland v. Majors*, 9-104.

(4620) **§ 65. Judgment.** The judgment in the cases mentioned in the two preceding sections shall be for the return of the property, or for the value thereof, or the value of the possession of the same, in case a return cannot be had, and for damages for withholding said property, and the costs of suit. [L. 1870, ch. 88, § 6 (§ 65, as amended); took effect March 10, 1870.]

The justice may render judgment for the full value of the property, "in case a return (of the property) cannot be had, and for damages for withholding said property, and the costs of suit." *Griffiths v. Wheeler*, 31-25.

(4621) **§ 66. Damages; Judgment.** In all cases when the property has been delivered to the plaintiff, where the jury shall find for the plaintiff on the trial, or on inquiry of damages, they shall assess adequate damages to the plaintiff for the illegal detention of the property, for which, with costs of suit, the justice shall render judgment against the defendant.

(4622) **§ 67. Damages Only.** When the property claimed has not been taken, the action may proceed as one for damages only, and the plaintiff shall be entitled to such damages as may be right and proper.

Where an action of replevin is commenced in the court of a justice, and by mistake the officer takes possession of the wrong property, and a redelivery bond is given by the defendant, and the property returned to him: *Held*, That the action may proceed as one for damages, but that the costs of the wrongful seizure and redelivery bond should be taxed to plaintiff, un-

less such seizure was caused by some misrepresentation of defendant. *Babcock v. Ashmead*, 24-585.

The decision on a motion to discharge attachment before justice, on the ground that the property is exempt, is not conclusive, and the judgment debtor may maintain replevin thereafter. *Watson v. Jackson*, 24-442.

With an ordinary summons in replevin, the court acquires jurisdiction of the parties whether the property is taken or not. And when the court obtains jurisdiction of the parties, it may proceed with the case as one for damages only, although no amount is indorsed on the summons. *Williams v. Gardner*, 22-126.

(4623) **§ 68. Break open Buildings.** The constable, in executing the writ, may break open any building or inclosure in which the property claimed, or any part thereof, is concealed; but not until he has been refused an entrance into said building or inclosure, and the delivery of the property, after having demanded the same.

(4624) **§ 69. Concealing Property.** Whenever it shall be made to appear to the satisfaction of the justice, by the affidavit of the plaintiff, or otherwise, that the defendant, or any other person, knowingly conceals the property sought to be recovered, or, having control thereof, refuses to deliver the same to the officer, the justice may commit such defendant, or other person, until he or they disclose where such property is, or deliver the same to the officer.

(4625) **§ 70. Penalty; Liability; Justice.** If any justice shall issue a writ to replevin property, as is provided by this act, without the affidavit and undertaking being executed and filed in his office, as is provided in this article, the same shall be set aside at his costs, and he shall be liable, in damages, to the party injured.

Writ of replevin issued without undertaking filed, and property seized; the justice is liable for all damages, even if money is afterward deposited to secure defendant. *Hannum v. Norris*, 21-114.

ARTICLE 6—BILL OF PARTICULARS.

SEC.

71. In what cases to be filed.

72. Must state what.

SEC.

73. Time of filing.

74. Amendment.

(4626) **§ 71. Bill of Particulars.** In all cases before a justice, the plaintiff, his agent or attorney, shall file with such justice a bill of particulars of his demand, and the defendant, if required by the plaintiff, his agent or attorney, shall file a like bill of particulars he may claim as a set-off; and the evidence on the trial shall be confined to the items set forth in said bills.

If a plaintiff, in an action before a justice of the peace, desires to know in advance whether a defendant claims a set-off, and the items thereof, the defendant, if required by him, shall file a bill of particulars; not otherwise. None is required by said § 71, before the justice, unless demanded by the plaintiff. (9-106; 14-228; 17-592; 14-399.) *Wagstaff v. Challiss*, 29-506.

The filing of the note with the indorsement thereon, in justice's court, *held*, to be a sufficient bill of particulars. *Brenner v. Weaver*, 1-488.

Note made payable to people of state of Illinois; bill of particulars failing to define "people of state of Illinois," *held* good. *Estey v. People*, 23-510.

No bill of particulars of set-off is required unless demanded by plaintiff. *German v. Ritchie*, 9-106; *Sanford v. Shepard*, 14-228; *Kuhuke v. Wright*, 22-466.

Bill of particulars omitting claim for attorney fees, (action for killing cattle by railroad company;) judgment for same in district court, on appeal, will not be disturbed, having been questioned for first time in supreme court. *K. P. R. R. v. Yanz*, 16-583. •

A defendant having filed an answer to a bill of particulars in a justice's court, and no new pleadings having been filed, the district court in the trial of the case on appeal may limit the investigation to the issues made by the pleadings in the justice's court. *Donnel v. Clark*, 12-154.

The district court might have required new pleadings. (L. 1870, p. 184, § 7.) *German v. Ritchie*, 9-106; *Donnel v. Clark*, 12-160.

It is sufficient if the bill of particulars, in a case before a justice, states the essential facts, no matter how rudely and inartistically drawn, yet so that the defendant is not misled, but clearly informed of the exact claim made upon him. *Kaub v. Mitchell*, 12-57; *M. K. & T. R. R. v. Brown*, 14-557; *Lobenstein v. McGraw*, 11-645.

Where the only question is one of fact, whether the defendant in an action before a justice of the peace filed a bill of particulars claiming over \$20, and upon that question the district court finds for the defendant, and dismisses the plaintiff's appeal, this court, unless in case of manifest error, will affirm such order of dismissal. *Smith v. Burkhalter*, 14-352.

A bill of particulars that alleges that a railroad corporation dug up and carried away clay from the land of plaintiff, is good without alleging that the corporation had not first proceeded to have the land condemned. 10-344.

Where a party files a bill of particulars in the form of a bill of account for "timber taken and received from" a certain tract of land (describing it), designating the number of pieces of timber so taken, and the value of each, and aggregate value of the whole, such bill of particulars, as a pleading, discloses an action on an account, and not one for trespass on real estate. *Bernstein v. Smith*, 10-61.

Bill of particulars claimed \$99.13; defendant set-off amounting to \$15.86. After jury summoned, plaintiff amended by adding \$20.00, and defendant added \$11.00; before the submission the plaintiff withdrew all his additional items except \$5.00, and the defendant all his additional items. The

justice was not divested of jurisdiction. The district court striking the proceedings from the files, because the justice had not jurisdiction, committed error. Bill of particulars before justices held to be a substitute for the petition and answer in courts of record of this state. Sections 110 and 111 of the civil code, authorizing the filing of a reply to the answer, make provision for the precise state of facts existing in the case at bar. *Wooster v. McKinley*, 1-317.

(4627) **§ 72. Bill of Particulars State What.** The bill of particulars must state, in a plain and direct manner, the facts constituting the cause of action or the claim to be set off.

It is sufficient if the bill of particulars state the essential facts. (12-57; 14-557; 11-645.) *Gas Co. v. Schliefer*, 22-468.

Interest allowed though not claimed in bill of particulars, the defendant being present. *Gas Co. v. Schliefer*, 22-468.

(4628) **§ 73. Time of Filing.** The bill of particulars of the plaintiff must be filed at the time the action is commenced, and that of the defendant must be filed at or before the hour named in the summons for the appearance of the defendant, unless further time be given by the justice, for good cause shown.

Defendant's bill of particulars is not required to be filed before demanded. *German v. Ritchie*, 9-111.

(4629) **§ 74. Amendment; Bill of Particulars; Continuance.** The bill of particulars may be amended at any time before the trial, or during the trial, or upon appeal, to supply any deficiency or omission in the items, when, by such amendment, substantial justice will be promoted. If the amendment be made at the time of or during the trial, and it be made to appear to the satisfaction of the justice, by oath, that an adjournment is necessary to the adverse party, in consequence of such amendment, an adjournment must be granted. The justice may also, in his discretion, require, as a condition of an amendment, the payment of costs to the adverse party, to be fixed by the justice; but such payment cannot be required unless an adjournment is made necessary by the amendment.

Suit against railroad company under law, (C. L. 1879, p. 784,) for killing colt; on appeal by defendant, plaintiff may amend bill of particulars to show demand. *M. P. R. R. v. Piper*, 26-58.

Action to recover money deposited with stakeholder as a bet. On appeal by defendant, the district court allowed plaintiff to amend bill of particulars, showing refusal to pay, and the court allowed defendant twenty days to answer. A judgment rendered without evidence as on default is erroneous. *Kuhuke v. Wright*, 22-464.

It is error for a court to allow a pleading to be amended in a material

respect, and then to render judgment thereon in the absence of the adverse party, and without any notice to him. And such amendment is erroneous, even where the action originated in a justice's court, and the amendment relates only to the amount claimed by plaintiff as attorney fees recoverable in the action. *L. L. & G. R. R. v. Van Riper*, 19-317.

But where the amendment is immaterial, and defendant loses nothing thereby, the error is immaterial. *Alvey v. Wilson*, 9-401.

Amendments in response to set-off held not in this case to oust the justice of jurisdiction. *Wooster v. McKinley*, 1-317.

ARTICLE 7—CHANGE OF PLACE OF TRIAL.

SEC.

75. Causes of change of place of trial.

76. Changed to justice of same township, when; changed to justice of adjoining township, when.

SEC.

77. Papers, etc., to be transmitted.

78. Costs.

79. What costs to be taxed, and how.

(4630) **§ 75. Causes for.** If, on the return of process, or at any time before trial shall have been commenced, either party shall file with the justice of the peace before whom any cause is instituted or is pending for trial, an affidavit, stating: *First*, That such justice is a material witness for either party; or, *Second*, That he verily believes that he cannot have a fair and impartial trial before such justice, on account of the bias or prejudice of the said justice against the affiant; or, *Third*, If a jury be demanded by the adverse party, then that he cannot, as he verily believes, have a fair and impartial trial in such township, on account of the bias or prejudice of the citizens thereof, the trial of the case shall be changed to some other justice of the peace, as provided in the next section.

It is the duty of the justice to make the change if the application is proper, but the failure to do so is simply erroneous, and the judgment is not void. *Barnhart v. Brother*, 30-523.

If the application is sufficient, the justice must grant the change. Continuance will not prevent change of venue. More than one change of venue may be had. *Herbert v. Beathard*, 26-746.

(4631) **§ 76. The Change; Township.** If the place of the trial be changed on account of the bias or prejudice of the justice, or of his being a material witness in the cause, such cause shall be transferred for trial before some other justice of the peace of the same township, if there be one there legally competent to try such cause; if there be no such justice within such township, or if such change be granted on account of the bias or prejudice of the citizens of such township against such

party, the case shall be taken to some justice in an adjoining township of the same county.

While the granting of a change of venue by the justice of the peace is purely a ministerial act, nevertheless, under the sections quoted, the justice may, in some cases, exercise judicial discretion, by determining the question as to what justice he will send the case. *Barnhart v. Brother*, 30-523.

(4632) § 77. **Papers, etc., Transmitted.** The justice granting such change shall deliver or transmit the papers in the cause, together with a certified transcript of the proceedings before him, to the justice to whom such change may be granted, who shall proceed therein, and have the same jurisdiction, powers and duties, in all respects whatever, as if such suit had been originally instituted before him.

Application for change of venue before justice. If the application when properly made is overruled, the ruling is merely erroneous, and the judgment subsequently rendered is not a nullity, or void for want of jurisdiction. *Barnhart v. Brother*, 30-523.

(4633) § 78. **Costs.** Before any such change shall be allowed, the costs, as specified in the next following section, shall be paid by the party applying for such change, or he shall have confessed a judgment therefor before the justice granting the change.

Where a plaintiff asks for a change of venue, he shall either pay or confess judgment for "all costs which have accrued, and which shall accrue in the cause, until the transcript and papers shall be delivered to the justice to whom such cause is removed for trial." *Herbert v. Beathard*, 26-751.

Where a defendant makes application for change of venue, and does not pay or offer to confess judgment for the costs required, the justice may properly refuse to grant the same. *Chapin v. Brown*, 17-143.

(4634) § 79. **Costs, how Taxed.** When such change is at the instance of the plaintiff, he shall be taxed with all the costs which have accrued, and which shall accrue in the cause, until such transcript and papers shall be delivered to the justice to whom such cause is removed for trial; and when on the application of the defendant, he shall be taxed with the costs which have accrued for issuing subpoenas to witnesses, and service thereof, witness fees, and costs of the justice for transferring the cause to the docket of the other justice.

Where a plaintiff asks for a change of venue, he shall either pay or confess judgment for "all costs which have accrued, and which shall accrue in the cause, until the transcript and papers shall be delivered to the justice to whom such cause is removed for trial." *Herbert v. Beathard*, 26-751.

Where a defendant makes application for change of venue, but does not pay or offer to confess judgment for the costs required, the justice may properly refuse the application. *Chapin v. Brown*, 17-143.

ARTICLE 8—TRIAL.

SEC.

80. Justice may adjourn trial, when.

81. Adjourned upon application of party, when.

82. Adjournment at return day may be had, how.

83. Party failing to appear, cause may proceed.

84. Proof of execution of instrument not necessary unless affidavit filed.

85. Subpoenas for witnesses.

86. By whom and how served.

87. No fees for service, when.

88. Costs when witness not examined.

89. Warrant for arrest of witness may be issued, when.

90. Fine is such case.

91. Liable to party for damages.

92. Deposition may be taken, in what case.

93. Action to proceed to trial at time appointed.

94. Appearance and trial without process.

95. Jury may be demanded, when; number and qualifications.

96. Adjournment when jury demanded.

SEC.

97. How jury made up.

98. Summons for jury, its form.

99. Service of summons.

100. Liability of jurors for not attending, etc.

101. Constable shall attend court; talesmen.

102. Upon adjournment, jurors to attend without notice.

103. Objection to juror, how tried.

104. Challenge of talesmen.

105. Oath of jury.

106. Instructions to jury.

107. Jury to hear evidence and agree upon verdict.

108. Shall deliver verdict to justice.

109. Proceedings when jury cannot agree.

110. New trial may be granted, when.

111. Opposite party to have notice of motion for new trial.

112. Bill of exceptions to be allowed and signed, when.

112a. Bill of exceptions in all cases; time.

112b. What may be set forth in bill.

(4635) § 80. **Adjournment.** Upon the return day, if a jury be required, or if the justice be actually engaged in other official business, he may adjourn the trial without the consent of either party, as follows: *First*, Where a party is in attendance who is not a resident of the county, or where the defendant is in attendance, under arrest, the adjournment not to exceed forty-eight hours, and the defendant, if under arrest, to continue in custody. *Second*, In other cases, not to exceed eight days, unless by consent of parties. If the trial be not adjourned, it must take place at the time stated in the summons.

(4636) § 81. **Continuance.** Either party may have the trial adjourned without the consent of the other, for a period not exceeding fifteen days, by filing an affidavit of himself, his agent or attorney, that he cannot, for want of material testimony which he has been unable to procure, safely proceed to trial. [L. 1885, ch. 152, § 1 (§ 81, as amended); took effect May 1, 1885.]

(4637) § 82. **At Subsequent Time.** An adjournment may

(4639) § 84. **Verification; Written Instrument; Account, etc.** In all actions, allegations of the execution of written instruments, and indorsements thereon of the existence of a corporation or partnership, or any appointment or authority, or the correctness of an account duly verified by affidavit or affirmation of the party, his agent or attorney, shall be taken as true, unless the denial of the same be verified by the affidavit of the opposite party, his agent or attorney. [L. 1886, ch. 60, § 1 (§ 84, as amended); took effect Feb. 13, 1886.] — / ' ' ,

Replevin founded on chattel mortgage, a copy of which is filed with the original pleadings, and the execution of the same is not denied by any affidavit; it is not necessary to prove the execution or existence of, or the amount due on, said chattel mortgage. *Mills v. Kansas Lumber Co.*, 26-578.

No affidavit was filed denying the execution of note or the making of indorsement of guaranty, and hence they must be taken as true without any proof thereof. *Alvey v. Wilson*, 9-405; *Pears v. Wilson*, 23-343; *Eggan v. Briggs*, 23-713.

(4640) **§ 85. Subpœnas.** Any justice may issue subpœnas to compel the attendance of witnesses to give evidence on any trial pending before himself, or for the purpose of taking depositions, or to perpetuate testimony.

(4641) **§ 86. Service of.** Subpœnas may be served by a constable or any other person, and shall be served by reading the same or stating the contents thereof to the witness, or by leaving a copy thereof at his usual place of residence.

(4642) **§ 87. No Fees.** When not served by a constable or some person deputed for that purpose by a justice, no fees shall be charged in the suit for serving it.

(4643) **§ 88. Witness not Examined; Costs.** If any witness, having been subpœnaed, attend, and be not examined by either party, the costs of such witness shall be paid by the party ordering the subpœna, unless the adverse party, by confessing the matter or otherwise, render unnecessary the examination of such witness.

(4644) **§ 89. Warrant for Arrest.** Whenever it shall appear to the satisfaction of a justice, by proof made before him, that any person has been duly served with a subpœna to appear and give testimony before him in any matter in which he has authority to require such witness to appear and testify, that his testimony is material, and that he refuses or neglects to attend as such witness, in conformity with such subpœna, the justice shall issue a warrant to arrest the delinquent, for the purpose of compelling his attendance and punishing his disobedience.

(4645) **§ 90. Fines.** When the person arrested is brought before the justice, or when a person in attendance refuses to testify as a witness, and no valid excuse be shown, the justice may impose a fine on him not exceeding five dollars. An entry of such fine, stating the reason thereof, must be made by the justice in his docket; and thereupon shall have the effect of a judgment in favor of the state of Kansas against

the delinquent, and may be enforced against his person or property.

(4646) **§ 91. Damages; Witness.** Every person subpoenaed as aforesaid, and neglecting to appear or refusing to testify, shall also be liable to the party in whose behalf he shall have been subpoenaed, for all damages which such party shall sustain by reason of such delinquency.

(4647) **§ 92. Deposition.** Depositions may be taken to be read in any cause pending before a justice of the peace, in like manner, and subject to the same rules and restrictions and rules of law, as in cases pending in courts of record.

(4648) **§ 93. Trial.** At the time appointed for trial, if no jury shall have been demanded by either party, the justice shall proceed to try the action, shall hear the proofs and determine the cause, according to law and the right.

(4649) **§ 94. Without Process.** Where the parties agree to enter, without process, before a justice, an action, of which such justice has cognizance, the justice shall enter the same on his docket and proceed to trial, judgment and execution, in all respects in the same manner as if summons had been issued, served and returned.

(4650) **§ 95. Jury; Number, etc.** In all civil actions, after an appearance of the defendant, and before the justice shall proceed to inquire into the merits of the cause, either party may demand a jury to try the action, which jury shall be composed of six good and lawful men, having the qualifications of jurors in the district court, unless the parties shall agree on a less number.

(4651) **§ 96. Adjournment.** When a jury is demanded, the trial of the case must be adjourned until a time fixed for the return of the jury; if neither party desire an adjournment, the time must be determined by the justice, and must be on the same day or within the next two days. The jury must be immediately selected as herein provided.

(4652) **§ 97. How Jury Made up.** The justice shall write in a panel the names of eighteen persons, citizens of the county, from which the defendant, his agent or attorney, must strike one name, the plaintiff, his agent or attorney, one, and so on alternately, until each shall have stricken six names, and the remaining six shall constitute the jury to try such case; and if either party neglect or refuse to aid in striking the jury as aforesaid, the justice shall strike the same in behalf of such party.

(4658) **§ 98. Summons for.** The justice thereupon shall issue a summons for the jury, in which the following form shall be observed, in substance, as near as practicable: "The state of Kansas, _____ county. The state of Kansas to _____, constable of _____ township: You are hereby commanded to summon _____ to appear before me at _____, in said township, on the _____ day of _____, A. D. _____, at _____ o'clock in the _____ noon, to serve as jurors in a case pending before me, then and there to be tried, and this they shall in no wise omit; and have you then there this writ, with your doings thereon. Given under my hand this _____ day of _____, A. D. _____. A. B., Justice of the Peace."

(4654) **§ 99. Service.** The constable shall serve such summons by a personal service thereof, and return the same indorsed with the names of the persons summoned, at the time appointed for the trial of the cause.

(4655) **§ 100. Liability of Jurors, etc.** Jurors, for neglecting or refusing to attend when properly summoned, or refusing to serve when in attendance, shall be liable to a like penalty, and be proceeded against in the same manner, as witnesses who fail to attend or refuse to testify.

(4656) **§ 101. Constable; Talesmen.** The constable shall be in attendance on the court, at and during the progress of the trial; and if, from challenge or other cause, the panel shall not be full, he may fill the same in the same manner as is done by the sheriff in the district court.

(4657) **§ 102. Jury, Duty of.** When a jury shall be in attendance and the cause shall be continued, the jurors must attend at the time and place appointed for the trial, without further notice.

(4658) **§ 103. Objection to.** If either party object to the competency of a juror, the question thereon must be tried in a summary manner by the justice, who may examine the juror or other witness under oath.

(4659) **§ 104. Challenge.** The plaintiff and defendant shall each be entitled to challenge peremptorily two talesmen.

(4660) **§ 105. Oath.** The justice shall administer an oath or affirmation to the jury, well and truly to try the matter in difference between the parties, and a true verdict give according to the evidence.

(4661) **§ 106. Instructions.** The justice shall, upon the request of either party, instruct the jury upon any point of law arising in the case; but such instructions shall be reduced to

writing before they are given, and shall be filed among the papers in the case.

(4662) **§ 107. Duty of Jury.** After the jury shall have been sworn, they shall sit together and hear the proofs and allegations of the parties, and, after hearing the same, shall be kept together in some convenient place, under the charge of a constable, until they have agreed upon their verdict or shall be discharged by the justice.

(4663) **§ 108. Verdict.** When the jurors shall have agreed upon their verdict, they shall deliver it to the justice publicly, who shall enter it upon his docket.

(4664) **§ 109. Jury Cannot Agree.** Whenever the justice shall be satisfied that a jury, sworn in any cause before him, cannot agree on their verdict, after having consulted upon it a reasonable time, he may discharge them and continue the cause, and may, if required by either party, proceed to strike another jury as hereinbefore provided. The cause shall be continued until such time as the justice thinks reasonable, unless the parties or their attorneys agree on a longer or shorter time, or unless they agree that the justice may render judgment on the evidence already heard before him.

(4665) **§ 110. New Trial.** The justice before whom a cause has been tried, on motion of the party aggrieved, at any time within five days after the decision or verdict, shall vacate the decision or verdict and grant a new trial, for the same reasons and upon the same terms and conditions as provided in the code of civil procedure in like causes; and he shall set a time for a new trial, of which the opposite party shall have at least three days' notice. [L. 1885, ch. 152, § 3 (§ 110, as amended); took effect May 1, 1885.]

(4666) **§ 111. Notice.** The opposite party shall also have a reasonable notice of such motion for a new trial, if the same is not made on the day of the former trial and in the presence of such party; such notice to be given by the applying party. If the new trial shall be granted, or the jury unable to agree, the proceedings shall be, in all respects, as upon the return of the summons.

(4667) **§ 112. Bill of Exceptions.** In all cases which shall be tried by a jury before a justice of the peace, either party shall have the right to except to the opinion of the justice upon any question of law arising during the trial of the cause; and when either party shall allege such exception, it shall be the duty of the justice to allow and sign a bill containing such

exception, if truly alleged, with the point decided, so that the same may be made part of the record in the cause.

After a bill of exceptions has been allowed and signed by a justice, if the same is filed at once by him, it thereby becomes a part of the record. It need not be entered in full upon the docket of the justice, as the law makes no such requirement. *McGowen v. Campbell*, 28-28.

Justices of the peace may allow bills of exception in cases tried before them, whether tried before the justice alone or before the justice and a jury. *Stager v. Harrington*, 27-420.

(4668) § 112a. **Bill of Exceptions in all Cases.** Bills of exception may be made, signed and sealed in any case tried before a justice of the peace, whether the action be tried by a jury or by the justice; and such bill may be signed and sealed at any time within ten days from the day on which judgment is given in the action, and not thereafter. [L. 1870, ch. 88, § 13; took effect March 10, 1870.]

It appears from the record that the bill of exceptions was not signed within ten days from the day on which judgment was rendered. Therefore, there is no sufficient transcript before us to demand a consideration of the merits of the matters preserved in the bill of exceptions. *Conwell v. Kuykendall*, 29-710.

Plaintiff failing to appear, and action is dismissed without prejudice, and judgment against plaintiff for costs; plaintiff may appeal. *Moore v. Toennisson*, 28-608.

Justices of the peace may allow bills of exception in cases tried before them, whether tried before the justice alone or before the justice and a jury. *Stager v. Harrington*, 27-420.

Proceedings in error, claiming "error in overruling a motion for a continuance." No exceptions were taken, and therefore, if there was any error, it was waived. (1-335; 2-160; 5-165; 5-361; 3-85.) *Lee v. Lovelidge*, 11-487.

(4669) § 112b. **Bill of Exceptions; Contents.** In all bills of exception it shall be competent for the party preparing the same to set out the pleadings, motions and decisions of the justice of the peace thereon; and the whole of the evidence given or so much as may be necessary to preserve the point or points raised and decided on the trial, and the rulings and decisions of the court and exceptions made thereto on the trial. [L. 1870, ch. 88, § 14; took effect March 10, 1870.]

ARTICLE 9—JUDGMENT.

SEC.

113. Judgment for dismissal without prejudice, may be entered, when.
114. Judgment rendered in absence of defendant, may be set aside; conditions.
115. Judgment, when rendered; when entered.

SEC.

116. Proceedings when sum due exceeds jurisdiction.
117. When defendant offers to allow judgment.
118. Judgment where defendant is subject to arrest and imprisonment.
119. Form of abstract of judgment of justice.

(4670) **§ 113. Judgment; Dismissal.** Judgment that the action be dismissed without prejudice to a new action, may be entered, with costs, in the following cases: *First*, When the plaintiff voluntarily dismisses the action before it is finally submitted. *Second*, When he fails to appear at the time specified in the summons, or within one hour thereafter, or upon adjournment.

Plaintiff failing to appear, and action is dismissed without prejudice, and judgment against plaintiff for costs; plaintiff may appeal. *Moore v. Toennisson*, 28-608.

(4671) **§ 114. Judgment in Absence.** When judgment shall have been rendered against a defendant, in his absence, the same may be set aside upon the following conditions: *First*, That his motion be made within ten days after such judgment was entered. *Second*, That he pays or confesses judgment for the costs awarded against him. *Third*, That he file an affidavit that he has a just and valid defense to the whole, or some part, of the plaintiff's claim. *Fourth*, That he notifies, in writing, the opposite party, his agent or attorney, or causes it to be done, of the opening of such judgment, and of the time and place of trial, at least five days before the time, if the party resides in the county, and if he be not a resident of the county, by leaving a written notice thereof at the office of the justice, ten days before the trial.

Motion to set aside judgment that was rendered in absence of party, made within five days, and also an offer to confess judgment for all costs in the case, and an affidavit that he had a just and valid defense, having been filed, and another justice, in absence of justice rendering judgment, marked the motion filed, and set the judgment aside, and set a time for trial. The defendant and his attorneys then left the office, and the justice of the peace came in and ratified the action of the other justice that had been done in his absence, and made an entry rendering judgment for plaintiff, and for all the costs. *Held*, Irregular, but not void. *Bates v. McConnell*, 32-2.

Justice overruling motion to set aside judgment rendered against defendants in their absence, not error. The affidavit not showing any defense, and being made by attorney who does not show that he is acquainted with the fact, not error. *Baker v. Knickerbocker*, 25-289.

(4672) § 115. **Rendition of Judgment.** Upon a verdict, the justice must immediately render judgment accordingly. When the trial is by the justice, judgment must be entered immediately after the close of the trial, if the defendant has been arrested, or his property attached; in other cases, it must be entered either at the close of the trial, or, if the justice then desires further time to consider, on or by the fourth day thereafter, both days inclusive.

Trial set for July 22, at 1 P. M. Both parties appeared. The justice required that plaintiff give security for costs. The defendant left with the understanding that the justice should notify him if it was done. After an hour the justice continued the case, on his own motion, to July 28, at 9 A. M. The defendant had actual knowledge, but was not present when the continuance was ordered. On July 28, the plaintiff gave security for costs, and defendant not appearing, judgment was given for plaintiff. *Held*, That the judgment, though irregular, is not actually and utterly void. *Roby v. Verner*, 31-307.

While "rendered" and "entered" are both used in this section, the only construction that obviates all difficulties is to interpret the word "entered" as used therein in the sense of "rendered." *Conwell v. Kuykendall*, 29-710.

Oral offer by defendant to confess judgment for a given sum, and the justice requested to reduce such offer to writing, in the presence of both parties, and he makes an entry on his docket of the fact of such offer. *Held*, To be a compliance with the statute, though not written out and filed until after the plaintiff had left the office; and was not signed. *Masterson v. Homberg*, 29-106.

In cases tried by a justice without a jury, in which there has been no arrest or attachment, the justice may withhold judgment if he desires until the fourth day after the close of the trial; (G. S., § 115;) but in the computation of time under said section both the day of the trial and the day of entering judgment must be counted. If not entered on the fourth day, it is error, and petition in error may be filed without an exception. *Stewart v. Waite*, 19-219.

A judgment of a justice, rendered upon a service of summons made only two days prior to the rendering of such judgment, is not void, but only voidable, and is valid until reversed, vacated or set aside by some direct proceeding instituted for that purpose. *Nelson v. Becker*, 14-509.

(4673) § 116. **Claims Exceeding Jurisdiction.** When the amount due to either party exceeds the sum for which the justice is authorized to enter judgment, such party may remit the

excess, and judgment may be entered for the residue. A defendant need not remit such excess, and may withhold setting the same off; and a recovery for the amount set off and allowed, or any part thereof, shall not be a bar to his subsequent action for the amount withheld.

On an appeal, when the defendant sets up and claims a set-off exceeding \$300, and does not withhold setting off any portion of the same, the district court has no jurisdiction to hear and determine such set-off or any portion thereof. *Wagstaff v. Challiss*, 31-214.

(4674) § 117. **Offer to Confess Judgment; Costs.** If the defendant, any time before trial, offers, in writing, to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fails to recover, in the action, a sum equal to the offer, he cannot recover costs accrued after the offer, but costs must be adjudged against him; but the offer, and failure to accept it, cannot be given in evidence or mentioned on the trial.

The fact that the offer was reduced to writing by the justice instead of by the defendant personally, or his attorney, is also immaterial. It was written by direction of the defendant, and when so written became in law his writing. Nor is the fact that the writing was not signed by the defendant, under the circumstances, a fatal omission. *Masterson v. Homberg*, 29-107.

Where an action is commenced before a justice of the peace to recover money upon an account for oats sold and delivered, and the defendant offers in writing to allow judgment to be taken against him for a sum less than the amount afterward recovered, and does not make any tender to the plaintiff, does not allege any tender of money in his answer, and does not deposit any money in court, the plaintiff is entitled to costs, as of course, upon the judgment in his favor. *King v. Harrison*, 32-216.

C. sued M. for trespass before justice of peace, and M. sued C. for trespass before a justice of the peace. Judgment for plaintiff in the first case, for \$37.50; and in the second, for plaintiff, for \$15.00. Both actions were appealed and consolidated, and tried as one action, and a judgment rendered in favor of M. for less than \$5.00. *Held*, That the judgment carried the costs of the entire consolidated action, although C. had in the justice's court, in action brought by M., offered to confess judgment for \$5.00. *Cockrell v. Moll*, 18-154.

(4675) § 118. **Judgment Authorizing Arrest, etc.** When judgment is rendered in a case where the defendant is subject to arrest and imprisonment, it must be so stated in the judgment and entered on the docket.

(4676) § 119. **Abstract.** For the purpose of docketing in the district court, the abstract of a judgment of a justice of the peace shall be in the following form (fill up the blanks as required): "State of Kansas, _____ county. _____, plaintiff, vs. _____, defendant. In justice's court, before _____, justice of the peace, _____ township, _____, 186—. Judgment entered for plaintiff (or defendant). Debt, \$____. Costs, \$____. I hereby certify that the foregoing is a full and correct abstract of a judgment rendered by me in the suit above entitled. _____, Justice of the Peace."

Where a judgment of a justice of the peace is attempted to be transferred, by an abstract filed under § 119, said abstract is not necessarily void for uncertainty on account of the omission of the dollar marks before the amount of the debt and costs, nor on account of the omission of accurate punctuation points in denoting dollars and cents. *Dickens v. Crane*, 33-344.

The filing of an abstract in the district court has the same force as the filing of a transcript of a judgment. (*Treptow v. Buse*, 10-170.) The filing of an abstract of a judgment rendered before a justice of the peace obviously contemplates a transfer of the judgment from the justice's court; and after the judgment is so transferred to the district court, it becomes subject to the same rules, and vested with the same powers, as though originally rendered in that court. After the abstract is docketed in the district court, the justice has no jurisdiction to issue process on the judgment. *Rahm v. Soper*, 28-530.

ARTICLE 10—APPEAL.

SEC.

- 120. Party may appeal from final judgment.
- 121. The undertaking, its conditions.
- 122. Transcript of proceedings, with undertaking, to be transmitted to court above; trial *de novo*.
- 123. Clerk to file papers, and docket appeal.
- 124. Parties in district court; pleadings, etc.
- 125. Proceedings on failure to deliver transcript.
- 126. Proceedings on failure to prosecute appeal.

SEC.

- 127. When no appeal entered, execution to be issued.
- 128. Appellant to pay costs, when.
- 129. Liability of surety.
- 130. Cause of quashing appeal to be stated in order of court.
- 131. Change, or renewal of undertaking.
- 132. Cases in which no appeal allowed.
- 132a. Proceedings on appeal in the action of forcible entry, etc.
- 133. Proceedings if justice's term of office expires before appeal taken.

(4677) § 120. **Appeal.** In all cases, not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace to the district court of the county where the judgment was rendered.

Plaintiff failing to appear, action dismissed without prejudice; appeal can be taken. *Moore v. Toennisson*, 28-610.

Trial by jury, failure to agree, and discharged, and court renders judgment. *Held*, That the party against whom judgment was rendered is not debarred from his appeal by the fact that neither party claims more than \$20.00. *Moore v. Toennisson*, 28-610.

No appeal can be taken from justice of the peace direct to supreme court. (15-322.) *City of Leavenworth v. Weaver*, 28-394.

No appeal will lie from order of justice discharging attachment, under § 53 of the justices' act. *Butcher v. Taylor*, 18-558.

The code of civil procedure controls, so far as it is applicable, proceedings in cases tried in the district court on appeal from justices' courts. *Copeland v. Majors*, 9-104.

D. appealed from a judgment of a justice. The justice left the transcript papers with the clerk more than five days before next term of the district court, and the clerk marked them filed on that day. On the first day of the term D. moved the court for leave to withdraw the transcript and papers and refile them, and supported his motion by his own affidavit, which states in substance that while he authorized the justice to leave the transcript and papers with the clerk for the convenience of his counsel, yet that he did not authorize the justice to file them; that they were filed without his consent or knowledge; and that he did not know that they were filed until two days before the first day of the term. The court dismissed his appeal for waiver of notice. *Held*, Error. After said dismissal D. filed another transcript, which the court struck from the files, and rendered judgment for costs. *Held*, Error. *Dooley v. Foster*, 5-269.

Where the defendant before a justice appeals to the district court, and is in default for six months in answering, and then files a general denial by consent, an order of the district court overruling a motion, unsustained by any showing, to then amend the answer as to set up new matter, is not error. *Marley v. Smith*, 4-183.

(4678) **§ 121. Appeal Bond.** The party appealing shall, within ten days from the rendition of judgment, enter into an undertaking to the adverse party, with at least one good and sufficient surety, to be approved by such justice, in a sum not less than fifty dollars in any case, nor less than double the amount of the judgment and costs, conditioned: *First*, That the appellant will prosecute the appeal to effect and without unnecessary delay; and, *Second*, That if judgment be rendered against him on the appeal, he will satisfy such judgment and costs; said undertaking need not be signed by the appellant: *Provided*, That when any municipality desires to appeal, no bond shall be required, and it shall be sufficient to perfect any such appeal if the appellant shall, within ten days after the rendition of the judgment, cause to be filed with the justice of the peace a statement in writing that appellant does appeal

from such judgment to the district court of the county, "and file an affidavit setting forth the appeal is not taken for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment." [L. 1885, ch. 152, § 4 (§ 121, as amended); took effect May 1, 1885.]

(4679) **§ 122. Proceedings on Appeal.** The appeal shall be complete upon the filing and approval of the undertaking as provided in section 121. The said justice shall immediately make out a certified transcript of his proceedings in the cause, and shall within twenty days from the rendition of the judgment, deliver or transmit to the clerk of the district court of his county the said transcript, the undertaking on appeal, and all the papers in the cause; all further proceedings before the justice of the peace in the case shall cease and be stayed on the filing of the undertaking with said justice; no notice of appeal shall be required to be filed or served, and the case shall be tried *de novo* in the district court upon the original papers on which the cause was tried before the justice, unless the appellate court, in furtherance of justice, allow amended pleadings to be made or new pleadings to be filed. [L. 1870, ch. 88, § 7 (§ 122, as amended); took effect March 10, 1870.]

By the filing and approval of the appeal bond, the appeal was perfected. Thereafter the justice had no power to make any order or to alter the record in the case. *Stuttle v. Bowers*, 31-434.

On appeal from justice to district court, the defendant has no absolute right to set up, claim and prove a set-off exceeding \$300; and when he does set up set-off exceeding \$300, and does not withhold setting off any part of the same, the district court has no jurisdiction of said set-off. *Wagstaff v. Challiss*, 31-212.

Where the party appealing from the final judgment of a justice of the peace to the district court of the county where the judgment is rendered shall, within ten days from the rendition of the judgment, enter into an undertaking to the adverse party, conditioned as required by law, with good and sufficient surety, in a sum double the amount of judgment and costs, it is the duty of the justice of the peace to file and approve the undertaking; he may be compelled to by mandamus. *Cox v. Rich*, 24-21.

There can be no such thing as a default in a justice's court, where the action is not founded upon a written instrument; and when an action is appealed to the district court, the case may be tried on same pleadings and in the same manner as might have been done in the justice's court. (*Stanley v. Bank*, 17-592.) The district court may, however, in furtherance of justice, "allow" new or amended pleadings to be filed. But the filing of a new or amended pleading by the plaintiff will not place the defendant in absolute default. (*Kuhuke v. Wright*, 22-464.) Every portion of the plaintiff's cause of action which was previously in issue will

remain in issue, although the defendant may not file any new or amended pleading. It is only the new matter set up in the new or amended pleading of the plaintiff that needs an answer, and it is only to such new matter that the defendant could be in default by not filing an answer. If the new or amended pleading contains nothing more than the original did, no answer is necessary. *Ziegler v. Osborn*, 23-464.

It is for the court to determine whether new pleadings should be filed on appeal; and the defendants in the case were not prevented from proving any counter-claim which they might have had by reason merely of said refusal to permit them to file said answer. *Stanley v. Bank*, 17-592; *Sanford v. Shepard*, 17-228, 231.

Upon appeal, the case was tried on the original papers. No demand was made on defendant for any pleading. The defense was usury. It was contended that it was error to admit testimony tending to show such a defense, as there was no bill of particulars or other pleading setting it up. There was no pleading of any kind filed by the defendant either before the justice or in the district court. The case shall be tried *de novo* in the district court, upon the original papers upon which the cause was tried before the justice, unless the appellate court in furtherance of justice allow amended pleadings to be made, or new pleadings to be filed. No demand was made that the defendant should state his defense in writing, and no error was committed by the court. *German v. Ritchie*, 9-110.

The statute does not authorize deposit of money in lieu of appeal bond in condemnation proceedings. Filing precept for subpoenas is not such an appearance as gave the court jurisdiction. *Beckwith v. K. C. & O. R. R.*, 28-484.

Discretionary with the district court to require the defendant to file his written answer to the bill of particulars. *Map Co. v. Jones*, 27-180.

Suit for injury to stock by railroad; on appeal by defendant, plaintiff amended bill of particulars to show demand had been made; not error. *M. P. R. R. v. Piper*, 26-61.

The filing and approval of the appeal bond perfects the appeal. (*St. L. & D. R. R. v. Wilder*, 17-243.) *Bond v. White*, 24-47.

(4680) **§ 123. Duty of Clerk; Transcript of Papers.** The clerk, on receiving such transcript and other papers aforesaid, shall file the same and docket the appeal; the plaintiff in the court below shall be plaintiff in the district court. [L. 1870, ch. 88, § 8 (§ 123, as amended); took effect March 10, 1870.]

(4681) **§ 124. Proceeding in Appeal.** If the appeal be taken ten days or more before the first day of the first term of the appellate court appointed to be held thereafter, such appeal shall be tried at such court unless continued in the same manner as other actions pending therein are continued; if the appeal be taken within ten days next preceding such term of the court, no issue of fact joined in such action shall be tried at such first term, unless upon the written consent of both

parties to the action; but it shall be competent for the court to hear a motion to dismiss such appeal, or any other proper motion, or to try any issue of law joined in such action, if both parties be present in person or by attorney. If the appeal be dismissed, the cause shall be remanded to the justice of the peace, to be thereafter proceeded in, as if no appeal had been taken. On receiving his fees in the case, the clerk of the court shall certify to the justice the order of dismissal, and he shall remit with such order all the papers returned by the justice on the appeal, except the transcript and undertaking; he shall also state the amount of his fees in the case, which shall be added to the costs in the case before the justice, and collected with such other costs, and paid to the party advancing the same. [L. 1870, ch. 88, §9 (§124, as amended); took effect March 10, 1870.]

The party appealing from the judgment of a justice of the peace may dismiss such appeal at any time before the commencement of the trial in the district court, if not at any time before the final submission on such trial; and upon such dismissal the judgment of the justice is restored, and has the same force and effect as though no appeal had been taken. *K. C., Ft. S. & G. R. R. v. Hammond*, 25-208.

The code of civil procedure controls, so far as it is applicable, proceedings in cases tried in the district court on appeal from justices' courts. *Copeland v. Majors*, 9-104; *Tarleton v. Briley*, 3-434.

The form of a judgment in replevin on appeal is provided for in sec. 185, civil code (ch. 80.) *Copeland v. Majors*, 9-104.

(4682) **§125. Repeal.** Repealed, L. 1870, ch. 88, §16; took effect March 10, 1870.

(4683) **§126. Repeal.** Repealed, L. 1870, ch. 88, §16; took effect March 10, 1870.

(4684) **§127. Repeal.** Repealed, L. 1870, ch. 88, §16; took effect March 10, 1870.

(4685) **§128. Appellant Pay Costs.** If any person, appealing from a judgment rendered in his favor, shall not recover a greater sum than the amount for which judgment was rendered, besides costs and the interest accruing thereon, every such appellant shall pay the costs of such appeal.

The appellee may not enlarge his claims to an extent beyond the jurisdiction of the justice, and thereby prevent the appellant from recovering a greater sum than the amount of judgment which he had formerly recovered, and thereby make the appellant pay the costs of appeal. *Wagstaff v. Challiss*, 31-216.

Costs adjudged against owner of land, on appeal in condemnation case. *A. & D. R. R. v. Lyon*, 24-748.

Ordinary appeal bond did not bring up question of attachment which had been discharged, and judgment for debt being the same as in lower court, appellant should pay costs of appeal. *Gates v. Sanders*, 13-414.

(4686) **§129. Liability of Surety.** When any appeal shall be dismissed, or when judgment shall be entered in the district court against the appellant, the surety in the undertaking shall be liable to the appellee for the whole amount of the debt, costs and damages recovered against the appellant.

(4687) **§130. Quashing Appeal.** When an appeal taken to the district court shall there be quashed, by reason of irregularity in taking or consummating the same, the cause for quashing shall be stated in the order of the court, and a transcript of such order shall be filed with such justice, who shall thereupon proceed to issue execution, in the same manner as if no appeal had been taken.

(4688) **§131. New Bond.** In proceedings on appeal, when the surety in the undertaking shall be insufficient, or such undertaking may be insufficient in form or amount, it shall be lawful for the court, on motion, to order a change or renewal of such undertaking, and direct that the same be certified to the justice from whose judgment the appeal was taken, or that it be filed in said court.

Ordinary appeal bond does not bring up question of attachment, and district court may refuse to permit bond to be amended. *Gates v. Sanders*, 13-414.

Appeal bond given to stranger to record, not a party; the district court may refuse to permit new bond to be given. *Lovitt v. W. & W. R. R.*, 26-298.

Condemnation proceedings; appeal bond approved by the county commissioners instead of the county clerk; the court properly permitted a new appeal bond to be given. *St. J. & D. C. R. R. v. Orr*, 8-419.

(4689) **§132. No Appeal.** An appeal may be taken from the final judgment of a justice of the peace in any case, except in cases hereinafter stated, in which no appeal shall be allowed: *First*, On judgments rendered on confession. *Second*, In jury trials, when neither party claims in his bill of particulars a sum exceeding twenty dollars. [L. 1870, ch. 88, §10 (§132, as amended); took effect March 10, 1870.]

This section applies only when the judgment before the justice is rendered as the result of a jury trial, and not to cases in which a jury disagree and the judgment is rendered by the independent action of the court. *Moore v. Toennisson*, 28-610.

Plaintiff claims \$14.00; defendant admits \$2.00; sets up also set-off of \$21.00, but itemized as \$22.15, and prays judgment \$21.00. After a jury

trial, taking the whole bill together, the parties are not barred of the right to appeal from the judgment. *Brooks v. Wright*, 19-501.

(4690) **§ 132a. Forcible Entry, etc.** In appeals taken by the defendant in actions for the forcible entry and detention, or forcible and unlawful detention of real property, the undertaking on appeal shall be conditioned that the appellant will not commit or suffer waste to be committed on the premises in controversy; and if, upon the further trial of the cause, judgment be rendered against him, he will pay double the value of the use and occupation of the property from the date of the undertaking, until the delivery of the property, pursuant to the judgment, and all damages and costs that may be awarded against him. [L. 1870, ch. 88, § 11; took effect March 10, 1870.

After appeal, when ample bond is given for all damages and costs, and that he will not commit or suffer waste, and pay double value of the use of the property, the appellee cannot maintain an action for an injunction to restrain appellant from removing the improvements. *Campbell v. Coonradt*, 26-68.

When the appeal bond does not clearly show that the appellant is bound not to commit waste, nor that he "will pay all damages that may be awarded against him," the justice is not required by law to approve the same. *Templeton v. Millis*, 24-381.

(4691) **§ 133. If Justice's Term Expires.** When the term of office of a justice shall expire between the date of the judgment and the time limited for appeal, such justice may take the undertaking for appeal, at any time before he has delivered his docket to his successor, and give the appealing party a transcript. After the delivery of the docket, the undertaking shall be given to his successor, and it shall be his duty to give the transcript, and do and perform all things required of his predecessor.

ARTICLE 11—STAY OF EXECUTION.

SEC.

134. Stay of execution to be applied for, when; undertaking.
135. How long granted.

SEC.

136. Not allowed, in what cases.
136a. Execution after stay of judgment.

(4692) **§ 134. Stay; Bond.** Any person against whom a judgment may be rendered, under the provisions of this act, except as hereinafter excepted, may have a stay of execution, for the several periods of time hereinafter mentioned, by entering into an undertaking to the adverse party, within ten

days after the rendition of the judgment, with good and sufficient surety, resident of the county, such as the justice shall approve, conditioned for the payment of the amount of such judgment, interests and costs that may accrue, which undertaking shall be entered on the docket of the justice, and shall be signed by the surety; and in case execution has been issued, it shall be immediately withdrawn by said justice.

(4693) § 135. **How Long.** The stay of execution hereby authorized shall be graduated as follows, namely: *First*, On any judgment for twenty dollars and under, thirty days. *Second*, On any judgment over twenty dollars and not exceeding fifty dollars, sixty days. *Third*, On any judgment over fifty dollars and not exceeding one hundred dollars, ninety days. *Fourth*, On any judgment exceeding one hundred dollars, one hundred and twenty days.

(4694) § 136. **Not Allowed.** No stay of execution on judgments rendered in the following cases shall be allowed: *First*, On judgments rendered against justices of the peace for refusing to pay over money by them collected or received in their official capacity. *Second*, On judgments against justices for not reporting all fines as required by law. *Third*, On any judgment rendered against a constable for failing to make return, making a false return, or refusing to pay over money collected in his official capacity. *Fourth*, On judgments against bail for the stay of execution. *Fifth*, Where judgment is rendered in favor of bail who have been compelled by judgment to pay money on account of their principal. *Sixth*, On judgments obtained by constables on undertakings executed to them for the delivery of property.

Subdivisions first and second of § 136 would seem to recognize judgments rendered by one justice against another for official misconduct; but still these subdivisions do not pretend to authorize the same to be done; and the whole of the article in which they are contained relates merely to stay of execution. *Neal v. Keller*, 12-252.

(4695) § 136a. **Execution after Stay.** In cases where execution on any judgment shall be stayed, as provided by sections 134 and 135 of said chapter 81, and such judgment shall not be paid or satisfied, the justice, after the stay shall have expired, shall issue an execution on such judgment against the judgment debtor and his surety, which execution shall be in the following form: County of _____, ss. The state of Kansas, to A. B., constable of _____, in said county, greeting: Whereas, C. D., on the _____ day of _____, 187—, in an action then pending before the undersigned, justice of the

peace, recovered a judgment against E. F. for the sum of — dollars, and the further sum of — dollars, as costs of suit; and whereas, on the — day of —, 187—, G. H. entered into an undertaking, as surety for the said E. F., for a stay of execution for — days, which time has now elapsed; and whereas, the said judgment still remains unsatisfied: Now, therefore, you are hereby commanded that of the goods and chattels of the said C. D. [E. F.], you cause the said judgment and costs to be satisfied as provided by law; and for want of sufficient goods and chattels of the said C. D. [E. F.], that you cause said judgment and costs to be satisfied out of the goods and chattels of the said G. H., and you are hereby required to make a return of this execution, with your certificate thereon, showing the manner in which you have executed the same, within thirty days from the time of your receipt hereof. Witness my hand, at — in said county, this — day of —, 187—. [L. 1870, ch. 88, § 12; took effect March 10, 1870.]

ARTICLE 12—EXECUTION.

SEC.

- 137. Execution may issue by justice or his successor, within what time.
- 138. When issued without demand.
- 139. By whom issued and to whom directed; its requisites.
- 140. Execution against joint debtors, some of whom not served.
- 141. Constable liable if he omit to arrest, or permit escape of debtor.
- 142. Sheriff may discharge prisoner, when.
- 143. Time and conditions of confinement.
- 144. Prisoner may be discharged on affidavit.
- 145. Constable liable for amount of execution, in what cases.
- 146. Notice of sale of property taken in execution.
- 147. Justice or constable not to purchase.
- 148. Allowance for keeping stock.
- 149. Inventory of goods sold to be annexed to return to execution.

SEC.

- 150. Schedule of goods and chattels unsold to be returned with execution; proceedings thereupon.
- 151. Security for redelivery of property.
- 152. Constable levying on goods and chattels claimed by another person than defendant, may require security of plaintiff.
- 152*a*. Trial of right of property.
- 152*b*. Proceedings upon trial had.
- 152*c*. Costs; non-liability of constable.
- 153. Landlord and tenant not affected by sale of crops when.
- 154. Justice may issue further process, when.
- 155. When execution returned unsatisfied, garnishee may be ordered to appear.
- 156. Order, how issued; subsequent proceedings same as in attachment.
- 157. Earnings of debtor not to be applied to payment of debts, when.
- 157*a*. When justice may issue execution against plaintiff for costs.

(4696) **§ 137. Execution may Issue; Five Years.** Execution for the enforcement of a judgment before a justice of the peace may issue by the justice before whom the judgment was rendered, or by his successor in office, on the application of the party entitled thereto, at any time within five years from the entry of the judgment or the date of the last execution issued thereon.

The justice rendering a judgment in an action pending before him has not jurisdiction to issue process on the judgment after an abstract of the judgment is docketed in district court. *Rahm v. Soper*, 28-531.

If the judgment may be revived by the justice, such revivor ought to have been had prior to filing a transcript in the district court. (*Angell v. Martin*, 24-334.) *Lindgren v. Gates*, 26-137.

(4697) **§ 138. Execution without Demand.** It shall be the duty of the justice, if the case be not appealed, taken up on error, docketed in the district court, or bail has not been given for the stay of execution, at the expiration of ten days from the entry of the judgment, to issue execution without a demand, and proceed to collect the judgment, unless otherwise directed by the judgment creditor.

The justice rendering a judgment in an action pending before him has not jurisdiction to issue process on the judgment after an abstract of the judgment is docketed in the district court. *Rahm v. Soper*, 28-531.

(4698) **§ 139. The Execution Described.** The execution must be directed to a constable of the county, and subscribed by the justice by whom the judgment was rendered, or by his successor in office, and must bear date the day of its delivery to the officer to be executed; it must intelligibly refer to the judgment by stating the names of the parties, and the name of the justice before whom, and of the county and township where, and the time when, it was rendered; the amount of the judgment, and, if less than the whole is due, the true amount due thereon. It must require the constable substantially as follows: *First*, If it be a case where the defendant cannot be arrested, it must direct the officer to collect the amount of the judgment out of the personal property of the debtor, and pay the same to the party entitled thereto. *Second*, If it be a case where any of the judgment debtors are certified on the docket as surety, it shall command that the money be made of the personal property of the principal debtor, and, for want thereof, of the personal property of the surety. In such case, the personal property of the principal, subject to execution within the jurisdiction, shall be exhausted before any of the property of the surety shall be taken in execution. *Third*, If it be a case

where the defendant may be arrested, in addition to the foregoing, it must direct the officer, if sufficient property of the defendant, subject to the execution, cannot be found to satisfy the judgment, that he arrest the debtor and commit him to the jail of the county until he pays the judgment or be discharged according to law, unless the execution be accompanied by an order of arrest. *Fourth*, It must, in all cases, direct the officer to make return of the execution, and a certificate thereon, showing the manner in which he has executed the same, in thirty days from the time of his receipt thereof.

Where upon a valid judgment in a justice's court a writ is issued which is in form an order of sale, that is, a command to satisfy the judgment out of certain named personal property, when nothing should have been issued but a general execution, that is, a command to satisfy the judgment out of any personal property not exempt; and where upon such writ the property named is sold, sold in the presence of and without objection from the defendant, and sold under such circumstances that it could fairly be said to be in the possession of the officer: *Held*, That, notwithstanding the irregularity in the proceedings, the title of the purchaser could not be questioned in a collateral proceeding. *Pracht v. Pister*, 30-572.

If sec. 470, code (ch. 80), does not apply to justices' courts, then clause second of § 139, above, is absolutely nugatory. *Points v. Jacobia*, 12-54.

(4699) **§ 140. Against Joint Debtors.** Upon an execution on a judgment against debtors, upon one or more of whom the summons was not served, the execution must contain a direction to collect the amount of the joint property of the person upon whom the summons was served, to be specified by name. If such judgment be also such that the defendants are subject to arrest thereon, the justice must further specify the names of those defendants served with the summons, who may be arrested for the want of property.

(4700) **§ 141. Constable Liable; Escape.** A constable may, at his peril, omit to arrest a debtor, or, after arrest, suffer him to go at large before the return day, subject only to the liability for an escape, or for omitting to arrest, if he fails to have either the money or the person of the debtor in custody at the expiration of the thirty days.

(4701) **§ 142. Discharge Prisoner.** It shall be lawful for the sheriff or jailor receiving any person imprisoned on any execution issued in any civil proceeding, at any time where there is no money in his hands to pay for the sustenance of such prisoner, to discharge him from prison.

(4702) **§ 143. Confinement.** The debtor, committed as herein provided, may be held in prison ten days, and if he be

a person without a family [for which he provides?], one day in addition for every dollar over ten due on the execution; or, if he have a family for which he provides, one day in addition for every two dollars over twenty due on the execution.

(4703) **§ 144. Discharged.** The affidavit of an imprisoned debtor that he has a family, for which he provides, specifying by name one or more persons, members of such family, and the place of their residence, is sufficient evidence thereof to authorize his discharge by the jailor.

(4704) **§ 145. Constable Liable.** A constable is liable to the party in whose favor an execution issued to him, for the amount thereof, in the following cases: *First*, Where he suffers thirty days to elapse without making a return thereof to the justice, and paying to him or the party entitled, the money collected thereon by him. *Second*, When he willfully and carelessly omits to levy on property within thirty days, or if the defendant be liable to be imprisoned, then to arrest and commit him to the jail of the county within thirty days.

(4705) **§ 146. Notice of Sale.** All property taken in execution, under the provisions of this act, shall be advertised for sale at four of the most public places in the township where such property was seized, at least ten days previous to the time appointed for such sale, which sale shall be held between the hours of ten o'clock A. M., and four o'clock P. M., at the house or on the premises where such property was taken, or at one of the most public places within the township.

All property levied on by a constable under an execution remains in the township where it is found, and it is advertised and sold in such township.
* * * We do not think that it is absolutely necessary that the trial of right to such property should be had in the township from which the execution issued. *Sponenbarger v. Lemert*, 23-63.

(4706) **§ 147. Not to Purchase.** It shall not be lawful for any justice of the peace who issued the execution, or for the constable holding the execution, to purchase, either directly or indirectly, any property sold on such execution; and any justice or constable who shall offend against the provisions of this section, shall forfeit and pay for every such offense, any sum not exceeding one hundred dollars nor less than five dollars, to be recovered by civil action in the name of the state of Kansas, before any court having jurisdiction thereof, for the use of the county where such offense was committed, and shall, moreover, be liable to the action of the party injured thereby.

(4707) **§ 148. Allowance; Costs; Fees.** When any cattle

or live stock shall be taken in execution, it shall be the duty of the justice of the peace who issued the execution, or other justice charged with the duty of collecting the judgment whereon such execution issued, to allow the constable, for keeping of the same, a reasonable compensation, to be taxed and collected as other costs in the suit.

(4708) **§ 149. Inventory.** When a constable shall levy on and sell any goods and chattels, he shall make out and annex to his return to the execution, in virtue of which such sale was made, a true inventory of all such property and of each article thereof, and the price at which the same was sold; and for each and every neglect to return a true and accurate schedule or inventory of property sold, or remaining unsold for want of bidders, or other just cause, and, if sold, the price at which the same was sold, each and every constable guilty of such neglect shall forfeit and pay, on conviction thereof, any sum not exceeding one hundred dollars, to be recovered by action in the name of the state of Kansas, for the use of the party injured thereby, to be prosecuted before any court having cognizance thereof.

(4709) **§ 150. Goods Unsold; Proceedings.** Where a constable shall have levied on any goods and chattels which remain unsold for want of bidders, or other just cause, it shall be his duty to return with the execution a schedule of all such goods and chattels; and the justice shall, unless otherwise directed by the party for whom such execution issued, or his agent, immediately thereafter issue an order, thereby commanding any constable to whom the same may be directed or delivered, to expose such property to sale; which sale and the proceeding thereon shall be the same as if such property had been sold on the original execution.

(4710) **§ 151. Security.** Any constable having levied on goods and chattels, of which he permits the party against whom the execution issued to retain the possession, is hereby authorized to take such security for his own indemnity as he may require, that such property shall be delivered at the time and place appointed for the sale thereof.

(4711) **§ 152. Require Security.** If the constable, by virtue of any attachment or execution, shall levy the same on any goods and chattels claimed by any person other than the defendant, or be requested by the plaintiff to levy on any such goods and chattels, the officer may require the plaintiff to give him an undertaking, with good and sufficient securities, to pay all costs and damages he may sustain by reason of the deten-

tion or sale of such property; and until such undertaking shall be given, the officer may refuse to proceed as against such property.

(4712) **§152a. Right of Property.** When a constable shall levy on or attach property, claimed by any person or persons, other than the party against whom the execution or attachment issued, the claimant or claimants shall give three days' notice, in writing, to the attachment or execution creditor, his attorney, or his agent, or if not found within the county, then such notice shall be served by leaving a copy thereof at his usual place of abode in such county, of the time and place of the trial of the right to such property, which trial shall be had before some justice of the township, at least one day prior to the time appointed for the sale of such property. [L. 1872, ch. 164, § 1; took effect June 20, 1872.]

A suit for the trial of the right of property, under chapter 164 of the Laws of 1872, p. 233, may be brought in the township where the property is found and is situated. *Sponenbarger v. Lemert*, 23-63.

Trial of the right of property, provided for by §§ 1, 2 and 3, C. L. 1879, pp. 725-6, is a special statutory proceeding, designed principally for the protection of the officer levying the order of attachment or execution; it is not conclusive upon the rights of the parties, and there is no appeal from the order or judgment of the justice hearing the cause. *Dilley v. McGregor*, 24-361.

One who comes in under chapter 164 of the Laws of 1872, and claims property attached or levied on, does not thereby concede the regularity of the proceedings; nor may he, like the defendant, avail himself of errors which are simply sufficient for reversal in direct proceedings therefor. He claims adversely to the proceedings, and can only make such objections as he could if attacking them in an independent collateral action. *Dickenson v. Cowley*, 15-269.

(4713) **§152b. Proceedings.** If, on the trial, the justice shall be satisfied, from the proof, that the property, or any part thereof, belongs to the claimant or claimants, such justice shall render judgment against the party in whose favor such execution or attachment issued for the costs, and issue execution therefor, and shall, moreover, give a written order to the constable, who levied on, or who may be charged with the duty of selling such property, directing him to restore the same, or so much thereof as may have been found to belong to such claimant or claimants: *Provided*, That either party may at or before the time of trial call for a jury, and in that case, the mode of drawing, and all proceedings there [therein], shall be conducted in all respects as is now provided for

trial by jury, before justices of the peace. [L. 1872, ch. 164, § 2; took effect June 20, 1872.]

(4714) **§ 152c. Costs.** But if the claimant or claimants fail to establish his or their rights to such property, or to any part thereof, the justice shall render judgment against such claimant or claimants for the costs that have accrued on account of such trial, and issue execution therefor; and the constable shall not be liable to the claimant or claimants for the property so taken. [L. 1872, ch. 164, § 3; took effect June 20, 1872.]

(4715) **§ 153. Not Affected by Sale of Crops.** In all cases where any lands may have been let, reserving rent in kind, and when the crops or emblements growing or grown thereon, shall be levied on or attached by virtue of any execution, attachment or other process against the landlord or tenant, the interest of such landlord or tenant against whom such process was not issued, shall not be affected thereby; but the same may be sold, subject to the claim or interest of the landlord or tenant against whom such process did not issue.

(4716) **§ 154. Further Process.** In cases where the constable shall make it appear, to the satisfaction of the justice, that he has been deprived of an opportunity of levying an execution within the time prescribed by this act, or otherwise prevented from making the whole of the money therein required to be made, and shall make return to the justice who issued the same to that effect, such justice is hereby authorized and required to issue further process of execution for the amount or balance remaining unsatisfied, which shall be served and returned in all respects as other executions are under this act.

(4717) **§ 155. Garnishment.** When an execution issued by a justice of the peace shall have been returned unsatisfied, the judgment creditor, his agent or attorney, may file an affidavit with the justice, setting forth that he has good reason to and does believe that any person or corporation, to be named, and within the county, has property of the defendant, or is indebted to him, and thereupon the justice shall issue an order to such garnishee to appear before him, on a day to be named, and answer such questions as may be propounded to him by the judgment creditor touching the property of the judgment debtor in his possession or under his control, and the amount owing by him to the judgment debtor, whether due or not.

Garnishee proceedings are authorized after as well as before judgment. Phelps v. A. T. & S. F. R. R., 28-173.

Agent or attorney may make affidavit. *Baker v. Knickerbocker*, 25-290.

(4718) **§156. Order; Proceedings.** Such order shall be issued in the same manner as a summons, and the subsequent proceedings upon such order shall be the same and have the same effect as proceedings against a garnishee in case of attachment, as near as may be.

(4719) **§157. Earnings Exempt.** The earnings of the debtor for his personal services, at any time within three months next preceeding the issuing of an execution, cannot be applied to the payment of his debts, when it is made to appear, by the debtor's affidavit or otherwise, that such earnings are necessary for the maintenance of a family supported wholly or partly by his labor.

(4719a) **§157a.** That the earnings of a debtor who is a resident of this state for his personal services, at any time within three months next preceding the issuing of an execution or attachment, or garnishment process, cannot be applied to the payment of his debts, when it is made to appear by the debtor's affidavit or otherwise that such earnings are necessary for the maintenance of a family supported wholly or partly by his labor. The filing of the affidavit by the debtor, or making proof as above provided, shall be conclusive, and it shall be the duty of the court in which is pending such proceeding to release all moneys held by such attachment or garnishee process, immediately upon the filing of such affidavit or the making of such proof. [L. 1886, ch. 111, § 1; took effect Feb. 27, 1886.]

The personal earnings of a debtor for three months next preceding the issuing of garnishee process, and necessary for the support of his family, are exempt from such process. (*Seymour v. Cooper*, 26-539.) And debts created after the service of garnishee process are not subject to such process. (*Phelps v. A. T. & S. F. R. R.*, 28-165.) *Muzzy v. Lantry*, 30-51.

(4719b) **§157b.** All acts or parts of acts in conflict with the provisions of this act be and the same are hereby repealed. [L. 1886, ch. 111, § 2; took effect Feb. 27, 1886.]

(4720) **§157c. Execution for Costs.** That upon the return of an execution issued from any justice's court, and returned unsatisfied by the constable to whom it was issued, or when execution has been withheld by order of plaintiff for a period of ninety days, the justice may, on his own motion, or on application of any party interested in the costs of the action, issue execution against the plaintiff in said action for the costs made by said plaintiff. [L. 1873, ch. 87, § 1; took effect March 20, 1873.]

ARTICLE 13—FORCIBLE ENTRY AND DETAINER.

SEC.

- 158. Jurisdiction of justice.
- 159. Cases to which this article is applicable.
- 160. Judgment no bar to second action.
- 161. Notice to leave, when and how served.
- 162. Summons not to issue until complaint filed; requisites of complaint.
- 163. Service of summons; its contents.

SEC.

- 164. Proceedings if defendant fail to appear.
- 165. Continuance; undertaking therefor.
- 166. When justice to try cause; judgment.
- 167. Trial by jury; their verdict.
- 168. Entry of verdict and judgment.
- 169. Exceptions.
- 170. Execution; form of writ.
- 171. How executed; proceedings stayed, when.

(4721) § 158. **Jurisdiction; Forcible Detainer, etc.** Any justice, within his proper county, shall have power to inquire, in the manner hereinafter directed, as well against those who make unlawful and forcible entry into lands and tenements, and detain the same, as against those who, having a lawful and peaceable entry into land or tenements, unlawfully and by force hold the same; and if it be found, upon such inquiry, that an unlawful and forcible entry has been made, and that the same lands and tenements are held by force, or that the same, after a lawful entry, are held unlawfully, then said justice shall cause the party complaining to have restitution thereof.

When a person has been in the actual and visible possession of real estate for over two years, under equitable color of title, no action of forcible detainer can be maintained against him; first, because of such possession for over two years; and second, because he holds the possession with color of title. *Alderman v. Boeken*, 25-658.

When a person enters peaceably upon a vacant lot, under a *bona fide* claim of title, with a view of holding possession, and then incloses the lot with a fence composed of posts and barbed wire, of such a nature as to inform all persons that the premises are appropriated: *Held*, That such person has the actual possession. *Campbell v. Coonradt*, 22-704.

If the actual possession of another be taken in his absence, by unlawfully and forcibly removing and destroying with a chisel and a hatchet or hammer a wire fence inclosing the premises, and such possession is continued to be detained against the will and consent of the original possessor, and a surrender of the premises is refused upon demand: *Held*, An unlawful and forcible entry and detainer, within the meaning of § 158. *Campbell v. Coonradt*, 22-704.

The only question that seems to be raised is, whether the plaintiff, who was entitled to possession of said land, but who does not seem to have ever

had actual possession of the same, could maintain the action of forcible entry and detainer. We think he could. *Price v. Olds*, 9-74.

(4722) § 159. **Article Applicable.** Proceedings under this article may be had in all cases against tenants holding over their terms; in sales of real estate on executions, orders, or other judicial process, when the judgment debtor was in possession at the time of the rendition of the judgment or decree, by virtue of which such sale was made; in sales by executors, administrators, guardians, and on partition, where any of the parties to the partition were in possession at the commencement of the suit, after such sales, so made, on execution or otherwise, shall have been examined by the proper court, and the same, by said court, adjudged legal; and in cases where the defendant is a settler or occupier of lands and tenements, without color of title, and to which the complainant has the right of possession. This section is not to be construed as limiting the provisions of the first preceding section.

(4723) § 160. **Judgment no Bar.** Judgments, either before a justice or in the district court, in actions brought under this article, shall not be a bar to any after action brought by either party.

(4724) § 161. **Three Days' Notice to Leave.** It shall be the duty of the party desiring to commence an action under this article, to notify the adverse party to leave the premises, for the possession of which the action is about to be brought, which notice shall be served at least three days before the commencing the action, by leaving a written copy with the defendant, or at his usual place of abode, if he cannot be found; such notice may also be served by leaving a copy thereof with some person over twelve years of age, on the premises described in the notice.

Where a lessor, for the purpose of terminating a three-years' lease, gives his tenant the requisite notice under § 7 of the landlord-and-tenant act: *Held*, That the lease will not be terminated within less than ten days after the notice is given: *And further held*, That if, within nine days after the giving of such notice, a second notice were given under § 161 of the justices' code, for the purpose of laying a foundation for the commencement of an action of forcible detainer, the second notice would be given prematurely, and would therefore be void. 32-594.

Action of forcible detainer is commenced January, 1884; trial May, 1884; it is shown that the defendant, on Dec. 19, 1883, was the tenant of the plaintiff under a three-years' lease, which by its terms would not expire until Aug. 1, 1884; and it is further shown, that on Dec. 19, 1883. the plaintiff, for the purpose of terminating the lease, gave to the defendant the requisite notice under sec. 7 of the landlord-and-tenant act, and also on

Dec. 28, 1883 for the purpose of laying the foundation for the commencement of the action of forcible detainer, gave to the defendant the requisite notice under § 161 of the justices' code: *Held*, That proof that the defendant, prior to Dec. 19, 1883, claimed he was not tenant but owned the land, and refused to pay rent, will not of itself prove that the tenancy was terminated prior to Dec. 28, 1883. *Douglass v. Parker*, 32-594.

The action of forcible entry and detainer must be brought within a reasonable time after service of the three-days' notice to leave the premises for the possession of which *the action is about to be brought*. *Douglass v. Whitaker*, 32-381.

If the three-days' notice to leave the premises is not given, he cannot maintain the action of forcible entry and detainer. *Nason v. Best*, 17-409.

(4725) **§ 162. Summons and Verified Complaint.** The summons shall not issue herein until the plaintiff shall have filed his complaint in writing, under oath, with the justice, which shall particularly describe the premises so entered upon or detained, and shall set forth either an unlawful and forcible entry and detention, or an unlawful and forcible detention after a peaceful or lawful entry of the described premises.

In an action of forcible entry and detainer, a description of the property in the affidavit as "the hotel commonly called the 'Clinton House,' in Indianola, Shawnee county, together with all the rooms, houses, garden, lots, etc., used in connection therewith," held sufficient. *Kuykendall v. Clinton*, 3-85.

(4726) **§ 163. Service.** The summons shall be issued and directed, shall state the cause of complaint, and the time and place of trial, and shall be served and returned as in other cases. It may also be served by leaving a copy thereof with some person over twelve years of age, on the premises sought to be recovered. Such service shall be at least three days before the day of trial appointed by the justice.

(4727) **§ 164. Default.** If the defendant does not appear in accordance with the requisitions of the summons, and it shall have been properly served, the justice shall try the cause as though he was present.

(4728) **§ 165. Continuance.** No continuance shall be granted for a longer period than eight days, unless the defendant applying therefor shall give an undertaking to the adverse party, with good and sufficient surety, to be approved by the justice, conditioned for the payment of all damages, and double the rent that may accrue, if judgment be rendered against the defendant.

(4729) **§ 166. Justice to Try; Judgment.** If the suit be not continued, place of trial changed, or neither party demand

a jury upon the return day of the summons, the justice shall try the cause; and if, after hearing the evidence, he shall conclude that the complaint is not true, he shall enter judgment against the plaintiff for costs; if he find the complaint true, he shall render a general judgment against the defendant, and in favor of the plaintiff, for restitution of premises and costs of suit; if he find the complaint true in part, he shall render a judgment for the restitution of such part only, and costs shall be taxed as the justice shall deem just and equitable.

(4730) **§ 167. By Jury; Verdict.** If a jury be demanded by either party, the proceedings until the impanneling thereof shall be in all respects as in other cases. The jury shall be sworn or affirmed to well and truly try and determine whether the complaint of (naming the plaintiff), about to be laid before them, is true, according to the evidence. If the jury shall find the complaint true, they shall render a general verdict of guilty against the defendant; if not true, then a general verdict of not guilty; if true in part, then a verdict setting forth the facts they find true.

(4731) **§ 168. Verdict and Judgment.** The justice shall enter the verdict upon his docket, and render such judgment in the action, as if the facts authorizing the finding of such verdict had been found to be true by himself.

(4732) **§ 169. Exceptions.** Exceptions to the opinion of the justice, in cases under this head, upon questions of law, may be taken by either party, whether tried by jury or otherwise.

(4733) **§ 170. Execution.** Where a judgment of restitution shall be entered by a justice, he shall, at the request of the plaintiff, his agent or attorney, issue a writ of execution thereon, which shall be in the following form, as near as practicable: "The state of Kansas, ——— county. The state of Kansas to any constable of ——— county: Whereas, in a certain action for the forcible entry and detention (or the forcible detention, as the case may be), of the following described premises, to-wit: ———, lately tried before me, wherein ——— was plaintiff, and ——— was defendant, judgment was rendered on the ——— day of ———, A. D. ———, that the plaintiff have restitution of said premises; and also that he recover costs in the sum of ———: you, therefore, are hereby commanded to cause the defendant to be forthwith removed from said premises, and the said plaintiff to have restitution of the same; also, that you levy of the goods and chattels of the said defendant, and make the costs aforesaid, and all accruing costs,

and of this writ make legal service and due return. Witness my hand this _____ day of _____, A. D. _____.

“A. B., Justice of the Peace.”

(4734) §171. **How Executed; Stay.** The officer shall, within ten days after receiving the writ, execute the same by restoring the plaintiff to the possession of the premises, and shall levy and collect the costs and make return, as upon other executions. If the officer shall receive a notice from the justice that the proceedings have been stayed by proceedings in error, he shall immediately delay all further proceedings upon the execution; and if the premises have been restored to the plaintiff, he shall immediately place the defendant in the possession thereof, and return the writ with his proceedings and costs taxed thereon.

ARTICLE 14—CONSTABLES.

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- 172. Justice may appoint constable for special purpose, in what cases.
- 173. Authority of person so appointed.
- 174. Justice to stand as his surety.
- 175. General powers of constable.
- 176. Duty in executing process.
- 177. May call aid.
- 178. Return of process.
- 179. Time of receiving process to be noted; manner of executing it to be stated.

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- 180. Return of “not found” shall not be made, unless, etc.
- 181. Authority of constable co-extensive with his county; power over goods and chattels, etc.
- 182. On taking prisoner to jail, copy of process to be left with sheriff.
- 183. Money received by constable to be paid to whom.
- 184. Liability.

(4735) §172. **Special Constable.** A justice of the peace may appoint a constable or constables for special purpose, either in civil or criminal cases, whenever such appointment may become necessary, in the following cases: Where there is no constable in the township; in the case of disability of one of the regular constables in the township; where the constable therein is a party to the suit; when, from the pressure of official business, the constables therein are not enabled to perform the duties required by the office. The justice making the appointment shall make a memorandum thereof on his docket, and shall require the person appointed to take an oath, as in other cases.

(4736) §173. **Authority.** The person so appointed by the justice, after taking such oath, shall have the same authority, be subject to the same penalties, and entitled to the same fees, as other constables.

(4737) **§ 174. Justice as Surety.** Such justice shall stand as surety, and shall be in that character liable, he and his sureties, for any neglect of duty or any illegal proceedings on the part of such constable so by him appointed.

(4738) **§ 175. General Powers.** All constables shall be ministerial officers in justices' courts in their respective counties, and civil and criminal process may be executed by them throughout the county, under the restrictions and provisions of the law. They may appoint one or more deputies, who may perform the same duties as their principals, and such principals shall be responsible, upon their official bond, for the acts of said deputies.

(4739) **§ 176. Duty.** It shall be the duty of every constable to serve all warrants, writs, precepts, executions and other process to him directed and delivered, and, in all respects whatever, to do and perform all things pertaining to the office of constable.

(4740) **§ 177. Call Aid.** In discharging their duties, constables may call to their aid the power of the county, or such assistance as may be necessary.

(4741) **§ 178. Return.** It shall be the duty of every constable to make due return of all process, to him directed and delivered, at the proper office and on the proper return day thereof; or, if the judgment be docketed in the district court, or appealed, upon which he has an execution, on notice to return the execution, stating thereon such fact.

(4742) **§ 179. The Same.** It shall be the duty of every constable, on receipt of any writ or other process (subpoenas excepted), to note thereon the time of receiving the same; he shall, also, state in his return on the same, the time and manner of executing it.

(4743) **§ 180. "Not Found."** No constable shall make a return on any process of "not found" as to any defendant, unless he shall have been once, at least, at the usual place of residence of the defendant, if such defendant have any in the county.

(4744) **§ 181. Authority.** In serving process, either civil or criminal, and in doing his duties generally, when not otherwise restricted by law, the authority of a constable shall extend throughout the county in which he may be appointed; and in executing and serving process issued by a justice of the peace, he shall have and exercise the same authority and powers over goods and chattels and the persons of parties as

is granted by law to a sheriff or coroner, under like process issued from courts of record.

(4745) **§ 182. Prisoner Taken to Jail.** When it shall become the duty of the constable to take the body of any person to the jail of the county, he shall deliver to the sheriff or the jailor a certified copy of the execution, commitment or other process, whereby he holds such person in custody, and return the original to the justice who issued the same, which copy shall be sufficient authority to the sheriff or jailor to keep the prisoner in jail until discharged by due course of law.

(4746) **§ 183. Money Received.** Constables shall pay over to the party entitled thereto all money received by them in their official capacity, if demand be made by such party, his agent or attorney, at any time before he returns the writ upon which he has received it; if not paid over by that time, he shall pay the same to the justice when he returns the writ.

(4747) **§ 184. Liability; Constable.** Constables shall be liable to ten per cent. penalty upon the amount of damages for which judgment may be entered against them for failing to make return, making a false return, or failing to pay over money by them collected or received in their official capacity; and such judgment must include, in addition to the damages and costs, the penalty herein provided.

ARTICLE 15—MISCELLANEOUS.

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185. Civil code to apply to justices' courts, when applicable.
186. Justice may require plaintiff to give security.
187. Or plaintiff who removes after action commenced.
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190. The index; how papers to be kept.
191. At expiration of term, justice to deposit his official docket, papers, etc., with his successor.
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193. Justice receiving docket, papers, etc., of another, may proceed, how.
194. When two justices equally entitled, how successor designated.

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195. In case of disability or absence of justice, other justice of same township to try cause.
196. Papers issued, void, if they contain a blank.
197. Justice may depute whom to serve summons.
198. Authority of such person; fees.
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200. Proceedings in such cases.
201. The same.
202. Attorneys at law may appear before justice; appearance to be noted in justice's docket.
203. Justice not to purchase judgment; penalty.
204. Suits pending not affected by this act.
205. Process may be directed to the sheriff.
206. Repeal.
207. Take effect.

(4748) **185. Code to Apply.** The provisions of an act entitled "An act to establish a code of civil procedure," which are, in their nature, applicable to the jurisdiction and proceedings before justices, and in respect to which no special provision is made by statute, are applicable to proceedings before justices of the peace.

An attachment cannot be issued by a justice on debt not due. *Lyons v. Insley*, 32-176.

Special provision for granting new trials in justices' courts is specifically made by § 110; and although the grounds therein given, authorizing the granting of new trials, are limited and few in number, yet evidently it was intended by the legislature that that section should cover the whole ground for the granting of new trials in justices' courts. *Kerner v. Petigo*, 25-657.

In this state, any cause of action arising from contract, whether it be for a liquidated demand or for unliquidated damages, may constitute a set-off, and be pleaded as such in any action founded upon contract, whether such action be for a liquidated demand or for unliquidated damages. This applies to justices' courts also. *Stevens v. Able*, 15-584.

It would seem from § 139 of the justices' act, that the same legislature that passed both the code and the justices' act intended that the provisions of § 470, ch. 80, should be applicable to justices' courts. *Points v. Jacobia*, 12-54.

Code, ch. 80, §§ 136-139, 396, are referred to because such code applies to proceedings before justices of the peace, when applicable, and where it is not otherwise provided by law; where amended bill of particulars is immaterial, and without notice to defendant, the error of the justice is immaterial in rendering judgment for plaintiff thereon. *Alvey v. Wilson*, 9-401.

(4749) **§ 186. Security for Costs.** When a person intending to bring an action before a justice of the peace is a non-resident of the county in which he intends to commence such action, the justice shall, previous to his issuing process, and in all other cases the justice may, either before or after the issuing process, require the plaintiff to give security for the costs of suit, which may be done by depositing a sum of money deemed by the justice to be sufficient to discharge the costs that may accrue in the action, or by giving an undertaking, with surety approved by the justice, payable to the adverse party, for the payment of all costs that may accrue in the action; where security is required after suit brought, if the order for security be not complied with, the justice may dismiss the action at the costs of the plaintiff. [L. 1870, ch. 88, § 15 (§ 186, as amended); took effect March 10, 1870.]

The statutes provide that a justice of the peace may require security for costs in certain cases. *Roby v. Verner*, 31-308.

On appeal, the district court ordered that the plaintiff give additional security for costs. The plaintiff failed to do so, and the court refused to dismiss the plaintiff's action because thereof, and afterward the plaintiff recovered a judgment against the defendant for debt, in a sum certain, and for costs of suit. No material error was committed in refusing to dismiss plaintiff's action. *Eastman v. Godfrey*, 15-341.

(4750) **§ 187. Party Removing after Action Commenced; Costs.** If any plaintiff or plaintiffs, after commencing an action before a justice, in the county in which he or they reside, remove out of the county, the justice may require such plaintiff or plaintiffs to deposit a sum equal to the costs that have accrued, and that probably will accrue; or require, in place thereof, that such party give sufficient surety for all costs which have accrued, or which may accrue in the action; and in default to do either, shall dismiss the action.

(4751) **§ 188. Docket of Justice.** Every justice of the peace must keep a book, denominated a docket, which shall be furnished by the proper township, in which must be entered, by him, the proper title of every action in which the writ is served, or when the parties voluntarily appear; the date of the writ; the time of its return; and if an order to arrest the defendant, or attach property, was made, such fact must be stated, together with the affidavit upon which such order was made; the filing of the bill of particulars of either party; which of the parties, if either of them, appear at the trial; every adjournment, stating upon whose application, whether on oath or consent, and to what time. When trial by jury is demanded, the demand must be stated, and by whom made; the names of the jurors selected, and the time appointed for the trial; the names of the jurors who appear, and those sworn; the names of all witnesses sworn, and at whose request; the exceptions to the ruling of the justice on questions of law, taken by either party; the verdict of the jury, and when received. If the jury disagree, and are discharged, that fact must be stated. The judgment of the justice, specifying the items of costs included, and the time when rendered; the issuing of the execution, and orders to sell, when issued, and to whom the renewals thereof, if any, were made; the return, and when made; and a statement of any money paid to the justice, and by whom; the giving of a transcript, to be filed in the clerk's office, and when given; if appeal be taken, the undertaking, and the time of entering into the same, and by which party taken; the satisfaction of the judgment, and the time of satisfying the same.

The statute directs what matters shall be entered on the docket of a justice of the peace, and if a party desires to preserve the rulings of a justice as to other matters, for review on petition in error, he must take a bill of exceptions. *Hagaman v. Neitzel*, 15-383.

Though a justice enters upon his docket a statement of matters other than those by law directed to be entered thereon, such statement does not thereby become a part of the record, and available for review in a higher court upon petition in error. *Hagaman v. Neitzel*, 15-383.

The justice is required to note on the docket the filing of the bill of particulars of either party. No bill of defendant was demanded before the trial. No bill or memorandum was presented or used by defendant until after plaintiff had finished his case. When the district court on appeal finds for the defendant on the question as to whether or not he filed a bill of particulars in the justice's court claiming over \$20.00, and dismisses the appeal, this court, unless in case of manifest error, will affirm such order of dismissal. *Smith v. Burkhalter*, 14-352.

The sureties on the official bond of a justice, as well as the justice himself, are liable to the owner of a judgment rendered by such justice and entered upon his docket, for money paid to and collected by said justice in satisfaction of said judgment, when the justice afterwards fails and refuses to pay over said money to said owner of the judgment. *Brockett v. Martin*, 11-380.

(4752) **§ 189. Entries.** The several particulars in the last section specified, must be entered under the title of the action to which they relate, and at the time when they occurred, except that the bill of exceptions in regard to the ruling on questions of law or evidence need not be entered until after the judgment, unless required by the justices, or one of the parties. Such entries in a justice's docket, or a transcript thereof, certified by the justice, or his successor in office, shall be evidence to prove the facts stated therein.

The sureties on the official bond of a justice, as well as the justice himself, are liable to the owner of a judgment rendered by such justice and entered upon his docket, for money paid to and collected by said justice in satisfaction of said judgment, when the justice afterwards fails and refuses to pay over said money to said owner of the judgment. *Brockett v. Martin*, 11-380.

(4753) **§ 190. Index; Papers to be Kept.** Each justice must keep an alphabetical index to his docket, in which must be entered the names of the parties to each judgment, with reference to the page of the entry. The names of the plaintiffs must be entered in the index, in the alphabetical order of the first letter of the family name. He shall number the cases progressively upon his docket, and he shall correspondingly number the papers in each case; he shall keep the entire

papers in each action together, and in packages of a proper and convenient size, and in the order in which the cases are numbered on his docket.

(4754) **§191. Disposition of Docket, etc.** It is the duty of every justice, upon the expiration of his term of office, to deposit with his successor his official docket, as well his own as those of his predecessors, which may be in his custody, together with all files and papers, laws and statutes pertaining to his office, there to be kept as public records and property. If there be no successor elected and qualified, or if the office becomes vacant by death, removal from the township, or otherwise, before his successor is elected and qualified, the dockets and papers in possession of such justice must be deposited with the nearest justice in the township, if there be any; and if there be none, then with the nearest in the county, there to be kept until a successor shall be chosen and qualified, then to be delivered over to such successor, on request.

(4755) **§192. Receipt.** A justice receiving by succession or on deposit any such docket, papers and laws, shall, if requested, give a receipt therefor to the person from whom he receives the same.

(4756) **§193. Receiving Docket, Papers, etc.** The justice with whom the docket of another may be deposited, either during a vacancy or as his successor, is hereby authorized, while having such docket legally in his possession, to issue execution on any judgment there entered and unsatisfied, and not docketed in the district court, in the same manner and with the same effect as the justice by whom the judgment was rendered might have done, to take bail in appeal, to issue certified transcripts of judgments on such docket, and proceed in all cases in like manner as if the same had been originally had or instituted before him.

(4757) **§194. Successors Designated.** When two or more justices are equally entitled to be deemed the successor in office of a justice, the county commissioners shall designate which justice is to be deemed the successor of the justice going out of office, or whose office has become vacant, and shall enter a certificate in the last docket of the justice going out of office, or whose office is vacant, of their determination, before the same is delivered to such successor.

(4758) **§195. Disability or Absence.** In case of sickness or other disability, or necessary absence of a justice at the time appointed for trial, another justice of the same township may, at his request, attend in his behalf, and shall, thereupon,

become vested with the power, for the time being, of the justice before whom the summons was returnable. In that case, the proper entry of the proceeding before the attending justice, subscribed by him, must be made in the docket of the justice before whom the writ was returnable. If the case be adjourned, the justice before whom the summons was returnable, must resume jurisdiction.

(4759) **§ 196. Blank Papers Void.** The summons, execution, and every other paper made or issued by a justice, must be filled up, without a blank to be filled by another; otherwise it is void.

(4760) **§ 197. Appoint Person to Serve Papers.** A justice, at the request of a party, and on being satisfied that it is expedient, may specially depute any discreet person of suitable age, and not interested in the action, to serve a summons or execution, with or without an order to arrest the defendant or to attach property. Such deputation must be in writing on the process.

(4761) **§ 198. Authority; Fees.** The person so deputed has the authority of a constable in relation to the service, execution and return of such process, and is subject to the same obligations; but there can be no fee for his services taxed in the bill of costs.

(4762) **§ 199. Contempts.** The justice may punish, as for a contempt, persons guilty of the following acts, and no others: Disorderly, contemptuous or insolent behavior toward the justice, tending to interrupt the due course of a trial or other judicial proceeding; willful resistance, in the presence of the justice, to the execution of a lawful order or process made or issued by him.

So far as judges of the district court acting in vacation or at chambers are concerned, the legislature has limited their powers, though even as to them it has placed no limit on the term of imprisonment they may impose. Upon the power of justices of the peace, it has also placed a limitation. *In re Millington*, 24-222.

(4763) **§ 200. Contempt; Punishment.** A warrant of arrest may be issued by such justice, on which the person so guilty may be arrested and brought before the justice, when an opportunity to be heard in his defense or excuse must be given. The justice may thereupon discharge him, or may convict him of the offense, and adjudge a punishment by fine or imprisonment, or both; such fine not to exceed twenty dollars, and such imprisonment ten days.

(4764) **§ 201. Contempt; Judgment.** The conviction,

specifying particularly the offense and the judgment thereon, must be entered on his docket; a warrant of commitment to the jail of the county, until the fine be paid, or for the term of imprisonment, may then be issued. Such warrant must contain a transcript of the entry in the docket, and the same must be executed by any constable to whom it may be given, and by the jailor of the county.

(4765) **§ 202. Attorneys.** Attorneys at law, duly admitted to practice as such, may appear for and represent any party before a justice, to the same extent and with the same effect as in the district court. When an attorney appears for a party, the justice shall note the fact of such appearance on his docket in the case in which the attorney appears, which shall have the same effect as an appearance of record in the district court.

(4766) **§ 203. Not Purchase Judgment.** It shall not be lawful for any justice of the peace to purchase any judgment upon any docket in his possession; and for so doing, for every such offense, such justice shall forfeit and pay a sum not more than fifty dollars nor less than ten dollars, to be recovered by action before any court having jurisdiction thereof, and when collected, shall be paid into the treasury of the county where such offense was committed.

(4767) **§ 204. Suits Pending.** The provisions of this act do not apply to proceedings in actions or suits pending when it takes effect. They shall be conducted to final judgment and determination in all respects as if it had not been adopted.

(4768) **§ 205. Process to Sheriff.** All process, provided for by this act, may be directed to the sheriff of the county, in the discretion of the justice, and be by the sheriff served and returned in the same manner as provided for in cases where the same is issued to the constable.

(4769) **§ 206. Repeal.** That "An act regulating the jurisdiction and procedure before justices of the peace, and the duties of constables in civil cases," approved February 10, 1859, and all acts amendatory and supplemental thereto, be and the same are hereby repealed.

(4770) **§ 207. Take Effect.** This act shall take effect and be in force from and after its publication in the statute book. [Approved March 2, 1868.]

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